Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1995

KATHLEEN QUICK,

Petitioner,

v.

NATIONAL AUTO CREDIT, INC.
f/k/a AGENCY RENT-A-CAR, INC.,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Should the Eighth Circuit be allowed to contravene and violate the Seventh Amendment to the United States Constitution by reexamining and reversing a jury verdict of actual damages, concluding that there was no fiduciary duty owed when the existence of the duty was admitted at the trial?

2. Should the Eighth Circuit be allowed to reexamine a jury verdict of actual damages (arising from a claim for breach of contractual obligations) when the amount of the actual damage sustained was admitted, undisputed, and uncontested on appeal?

3. Should the Eighth Circuit be allowed to interpret Missouri law in such a fashion that a car rental company providing liability protection to its renters may not be exposed to a claim of consequential damages because of a breach of its contractual obligations provided in the rental contract and thus create disparate treatment between persons who sustain damages due to a breach of contract, thereby denying equal protection?

4. Should the Eighth Circuit be allowed to rule, contrary to Missouri case law and its own precedent, that a claim for the tort of bad faith, arising from a breach of contractual and fiduciary obligations to settle within limits of liability protection available, is not assignable to a judgment creditor?

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Kathleen Quick, respectfully requests the Court to issue a Writ of Certiorari in order to review the Opinion of United States Court of Appeals for the Eighth Circuit entered on the 12th day of September, 1995, and the subsequent denial of the petition and suggestion for rehearing entered on the 2nd day of November, 1995.

OPINIONS BELOW

The opinion of United States Court of Appeals for the Eighth Circuit, (App., *infra*, 1), is reported at 65 F.3d 741 (8th Cir. 1995). The judgment entered by the United States District Court on the jury verdict, (App., *infra*, 19), is unreported. A related opinion was issued by the Missouri Court of Appeals and is reported as follows: *Quick v. Wilhite*, 895 S.W.2d 90 (Mo.App. 1995). (App., *infra*, 20).

JURISDICTION

Judgment of the United States District Court for the Western District of Missouri was entered on the jury verdict on the 28th day of September, 1994. The Opinion of the United States Court of Appeals for the Eighth Circuit reversing the trial court's judgment entered on the jury verdict was issued on the 12th day of September, 1995. A petition for rehearing en banc and before the panel was filed with the United States Court of Appeals for the Eighth Circuit on the 26th day of September, 1995. (App., *infra*, 60). The petition for rehearing en banc and

petition for rehearing by the panel was denied by the United States Court of Appeals for the Eighth Circuit on the 2nd day of November, 1995. Jurisdiction of the United States Supreme Court is sought pursuant to Title 28 U.S.C. §1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

AMENDMENT VII TO THE UNITED STATES CONSTITUTION

Civil Trials

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

AMENDMENT XIV TO THE UNITED STATES CONSTITUTION

Section 1. Citizens of the United States

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Missouri Statutes:

§303.160 R.S.Mo., (App., *infra*, 27)

§303.190 R.S.Mo., (App., *infra*, 29)

§303.220 R.S.Mo., (App., *infra*, 28)

STATEMENT OF THE CASE

The United States Court of Appeals for the Eighth Circuit has reversed a judgment entered on a jury verdict for assigned claims of breach of contract and bad faith arising out of fiduciary duties owed by a car rental company to provide defense of a liability suit and to settle within the limits of liability protection available under a car rental contract. The car rental company, Agency Rent-A-Car, Inc. (hereinafter referred to as "Agency"), refused to settle a wrongful death claim by paying the $25,000.00 limit of liability protection available for its renter and failed and refused to defend a suit for wrongful death instituted against its renter after specifically reserving rights to control defense.

Agency admitted during trial that it owed a fiduciary duty to its renter, Kendrick Wilhite (hereinafter referred to as "Wilhite"), to provide defense and effect settlement within the liability protection limits available in order to protect him. Contrary to the testimonial admissions of Agency's representative during trial, the Eighth Circuit Court of Appeals held that there was no fiduciary duty owed by Agency. Utilizing its own factual determination, the Eighth Circuit held that there was no bad faith established.

The Eighth Circuit also reduced the amount of actual damages assessed by the jury verdict, in the amount of $6.5 million with interest, to $25,000.00, although the outstanding judgment against petitioner's assignor, Wilhite, exceeded $6.5 million. Agency admitted during trial that the judgment against Wilhite would not have been obtained had it fulfilled its obligation to provide defense of Wilhite in the wrongful death suit instituted in a Missouri state court.

In July, 1992, Kendrick Wilhite, a student at the University of Nebraska, contracted for the rental of an automobile from Agency. Wilhite traveled to his home in St. Louis, Missouri, to visit his family. On the return trip he was involved in an automobile accident resulting in the death of an 11 year old girl.

The rental contract which Wilhite was required to execute with Agency, (App., *infra*, 38), provided liability protection up to $25,000.00 per person, $50,000.00 per occurrence. Agency is a self-insured company in the State of Missouri and other states and similar to insurance companies, maintains its own in-house claims department, claims manual, claims adjusters and attorneys for the purpose of handling liability claims asserted against renters of its automobiles.

The executed rental contract provided that Agency had the right to control defense of any liability suit instituted against Wilhite as well as the right to determine when and if settlement should be effected. The rental contract also included a penalty provision, typical of many liability insurance contracts, providing that Agency

would not be obligated to pay any settlement obligation assumed independently by the renter.

Kathleen Quick, natural mother of the deceased 11 year old girl, retained an attorney and a claim was asserted against Wilhite. Agency was contacted by attorney for Kathleen Quick and demand was made for payment of the $25,000.00 liability protection limit available to Wilhite under his rental contract in order to resolve the wrongful death claim. Agency notified Wilhite of the claim, the limits of liability protection, and undertook negotiations with the attorneys for Kathleen Quick. Agency failed and refused to settle the claim for the $25,000.00 limit of liability protection available. Agency admitted knowing that Wilhite had no other liability insurance.

The attorneys for Kathleen Quick instituted a wrongful death suit. Copies of suit papers reflecting the institution of suit against Kendrick Wilhite were forwarded to claims representatives for Agency with a cover letter dated March 12, 1993. (App., *infra*, 54).

During a March 30, 1993 telephone discussion between one of Kathleen Quick's attorneys and a claims representative for Agency, Kathleen Quick's attorneys learned that Agency remained unwilling to settle by paying its limits of liability protection in exchange for a liability release from Kathleen Quick in favor of Wilhite. Agency also indicated it was unwilling to interplead its funds available for satisfaction of all injury claims arising from the accident. There were no other serious claims for injuries. Agency was advised that service of process had been obtained upon Wilhite and that it would need to

proceed with making a decision as the time for pleading was running.

On April 5, 1993, an attorney for Kathleen Quick submitted a letter to the claims department of Agency confirming the understanding obtained as a result of the phone conversation of March 30, 1993. The letter also confirmed that previous settlement demand had been made for the liability protection limits and included accusations against Agency that it was acting in "bad faith", exposing its insured to "catastrophic personal liability", "outrageous conduct", and stated that the claim for wrongful death may have a value of several million dollars. (App., *infra*, 57).

Agency's claims department did not take any action to provide defense of Kendrick Wilhite after receipt of the letters from attorneys for Kathleen Quick dated March 12, 1993, and April 5, 1993. No efforts were made to effect settlement. A claims adjuster with Agency made an entry in the company's claims diary on March 19, 1993, wherein he opined that "the accident is of a very serious nature and that the case is an obvious limits case". (App., *infra*, 44).

On April 27, 1993, after presentation of a significant amount of evidence, a default judgment was rendered against Kendrick Wilhite in the Circuit Court of Wright County, Missouri, for $6.5 million with interest at 9% from the date of judgment until paid. (App., *infra*, 36). Agency and its attorneys learned of the default judgment one week after the date of its entry.

Five months later, on September 23, 1993, Wilhite learned of the default judgment and assigned to Kathleen

Quick any claims he might have, whether in contract or in tort, against Agency by reason of its failure or refusal to defend him or settle the wrongful death claim within the limit of liability protection available to him under his rental contract. (App., *infra*, 34).

In November, 1993, Kathleen Quick as assignee of Kendrick Wilhite instituted suit against Agency Rent-A-Car, Inc. in the United States District Court for the Western District of Missouri, Southern Division in Springfield, Missouri. The complaint alleged claims for breach of contract and bad faith. Jurisdiction of the federal district court was premised upon diversity of citizenship pursuant to Title 28 U.S.C. §1332(a).

During the course of the suit in federal court, Agency sought to assert a counterclaim against Kathleen Quick, as well as a third party complaint against her attorneys that had represented her through the time that the default judgment had been obtained on her behalf against Wilhite. The counterclaim ultimately was dismissed by the trial court. Leave to assert a third party complaint against the attorneys was denied.

In March, 1994, while discovery was ongoing in the federal court suit, Agency instituted a separate declaratory judgment action in the Circuit Court for the City of St. Louis, Missouri, naming Wilhite as a defendant, whereby Agency sought to obtain a declaratory judgment that there was no liability protection or coverage obligation due from Agency to Wilhite on the judgment rendered against Wilhite in the Circuit Court of Wright County, Missouri. Kathleen Quick was not a named party

to the state court declaratory judgment suit. The allegations made by Agency in its declaratory judgment suit were the same as a number of its defenses previously asserted in its answer to the complaint filed in federal court.

The Circuit Court for the City of St. Louis, Missouri, refused to grant Wilhite's motion to dismiss the declaratory judgment suit, which was premised on the fact that there was another action previously pending in the United States District Court. Thereafter, Kathleen Quick intervened in the declaratory judgment action asserting that, as assignee of all of Wilhite's claims against Agency, she was an indispensable party. Quick's intervention effected a delay of the trial scheduled on the state court declaratory judgment suit.

A jury trial on the assigned claims for bad faith and breach of contract commenced in federal court on September 26, 1994. The jury returned its verdict on September 28, 1994, for breach of contract and bad faith, awarding actual consequential damages in the amount of $6.5 million with 9% interest from April 27, 1993 (the full amount of the underlying judgment rendered against Wilhite), and assessing punitive damages in the amount of $885,000.00. (App., *infra*, 19).

Agency appealed to the United States Court of Appeals for the Eighth Circuit after the trial court denied post trial motions. The Eighth Circuit Court of Appeals determined that there was no fiduciary duty owed by Agency to Wilhite, although Agency had never asserted during trial, in post trial motions, or on appeal, that it did not owe a fiduciary duty. The Eighth Circuit Court of

Appeals also held, after initially determining that the bad faith claim must fail on the merits due to lack of a fiduciary duty, that the bad faith claim was not properly assigned to Kathleen Quick and was not assignable. The Eighth Circuit held that Wilhite had assigned the claim for breach of contract to Kathleen Quick and that a claim for breach of contract had been established. Without explanation, the Eighth Circuit determined that the amount of actual damages resulting from the breach was $25,000.00, instead of the amount of the adverse judgment rendered against Kendrick Wilhite by reason of the breach, $6.5 million, which was the amount of actual damages determined by the federal court jury verdict.

REASONS FOR GRANTING THE WRIT

The Seventh Amendment to the United States Constitution provides United States citizens a written guaranty from their Government that they will not be deprived by a United States Court the benefit of a fact determination in their favor made by a jury. The Eighth Circuit has deprived petitioner Kathleen Quick of this fundamental guaranty by reversing the judgment entered on a jury verdict, premised upon breach of a fiduciary duty which Agency Rent-A-Car, Inc. admitted that it owed during the jury trial in federal district court.

This Court consistently has upheld the Seventh Amendment limitations prohibiting courts from engaging in fact finding where that function previously was delegated to a jury. *Basham v. Pennsylvania R.R.*, 372 U.S. 699, 10 L. Ed. 2d 80, 83 S. Ct. 965 (1963). Recently this Court

has provided a passing reiteration of the rule in *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 114 L. Ed. 2d 660, 111 S. Ct. 2077 (1991). Prior to the instant case, the Eighth Circuit has complied with this constitutional mandate. See, *Green v. American Airlines, Inc.*, 804 F.2d 453 (8th Cir. 1986).

The Eighth Circuit needs a direct reminder of the long standing constitutional obligation to refrain from making its own factual determinations in order to justify its chosen result. This case presents that opportunity.

Agency's Vice President and head of its claims department admitted under oath, during direct examination before the jury, that his company insists upon controlling defense and settlement of claims asserted against their renters. He also admitted under oath, during direct examination before the jury, that his company owes to its renters a fiduciary duty, a duty of trust, because it insists upon controlling defense and settlement. See quoted testimony set forth in Petitioner's Petition And Suggestion For Rehearing En Banc (App., *infra*, 62, 63, 65, 66, 67). It is within the province of the jury to decide whether to believe the testimonial admissions of a witness. In returning a verdict against Agency on the bad faith and breach of contract claims, it is implicit that the jury believed the testimonial admissions of Agency's Vice President and head of the claims department that the company controls the defense and settlement of claims against its renters and therefore owes its renters a fiduciary duty.

Incredibly, the Eighth Circuit has reversed the judgment entered on the jury verdict, based in part on its own fact determination that Agency did not control settlement

or control defense and owed no fiduciary duty to Wilhite. A clearer refutation of the Seventh Amendment and its limits is hard to imagine.

The Eighth Circuit also has unconstitutionally invaded the province of the jury in redetermining actual damages assessed by the jury's verdict. There could have been no award of exemplary damages without existence and award of actual damage. The amount of the actual damage visited upon Wilhite was clear, unequivocal and undisputed, during trial and on appeal. To date, Wilhite owes in excess of $6.5 million, evidenced by a judgment, which he would not owe if Agency had fulfilled its obligations to defend him. Agency admitted this at trial.

The general rule on the measure of damages due to a breach of contractual obligation (in this case, the obligations to defend and settle) has been just as clear as the constitutional prohibition against an appellate court's engaging in independent fact finding after a jury trial. The long standing rule for economic injury is that the damage assessment should be equal to the injury. That is, the injured party is to be made whole. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 45 L. Ed. 2d 280, 95 S. Ct. 2362 (1975). This general and long standing rule has been followed by the Missouri Supreme Court, see *Boten v. Brecklein*, 452 S.W.2d 86 (Mo. 1970), and the Eighth Circuit, see *United Industrial Syndicate, Inc. v. Western Auto Supply Co.*, 686 F.2d 1312 (8th Cir. 1982).

Without explanation, the Eighth Circuit determined that Wilhite's actual damages were only $25,000.00. In this case, the Eighth Circuit has ignored the very fundamental contract principle pertaining to the appropriate

measure of damages. The reduction of these damages from a sum in excess of $6.5 million to $25,000.00 by the stroke of the appellate judicial pen is in conflict with long standing general contract law, and it is evidence of another violation of the Seventh Amendment's restriction on an appellate court's making findings of fact contrary to those previously determined by a jury.

Additionally, the Eighth Circuit arguably has created a separate measure of damages for breach of an obligation to defend and provide liability protection which is completely different from the measure of damages for the breach of any other contract obligation. There is no rational basis, reason, or legal justification for creating such unequal and disparate treatment. The common law and the Fourteenth Amendment to the United States Constitution condemn this result.

The Eighth Circuit, in denying consequential damages caused by a breach of a contract providing liability protection, is now in conflict with the Fifth Circuit (see *Columbia Mut. Ins. Co. v. Fiesta Mart, Inc.*, 987 F.2d 1124, 1127 [1993]); the Ninth Circuit (see *Consolidated Am. Ins. v. Mike Soper Marine Servs.*, 951 F.2d 186, 190 [1991]); the Seventh Circuit (see *Green v. J. C. Penney Auto Ins. Co., Inc.*, 806 F.2d 759, 763 [1986]); the D. C. Circuit (see *Gray v. Grain Dealers Mut. Ins. Co.*, 871 F.2d 1128, 1133 [1989]); the Tenth Circuit (see *Coleman v. Holecek*, 542 F.2d 532 [1976]), prior decisions of the Eighth Circuit and Missouri decisions. All of the above hold to the general proposition that if an insurer fails to settle or defend, it is liable for the damages caused by the breach.

Missouri has adopted this position in the cases of *Landie v. Century Indemnity Company*, 390 S.W.2d 558 (Mo.App. 1965), and *Fuller v. Lloyd*, 714 S.W.2d 698 (Mo.App. 1986). These cases uphold the theory of damage assessments by requiring those who breach a contract providing liability protection to assume responsibility for the consequential damages caused by the breach.

The Eighth Circuit, en banc, cited *Landie* with approval in upholding consequential damages assessed against an insurer in the case of *Luke v. American Family Mutual Insurance Company*, 476 F.2d 1015, 1021 (8th Cir. 1973), stating: *"We find the entire judgment was the natural consequence and proximate result of the defendant's breach of its obligation to defend its insured."* (See also *Carpenter v. Automobile Club Interins. Exch.*, 58 F.3d 1296, 1302 [8th Cir. 1995], holding that an insured could not be whole unless allowed to collect damages equal to the entire amount of the underlying state court judgment from the insurer).

Self-insured car rental companies are required by Missouri statute to pay the same judgments in the same amounts as an insurer would have been obligated to pay under an owner's motor vehicle liability policy. §303.160 R.S.Mo. (App., *infra*, 27). Indeed, self-insured car rental companies, such as Agency, are required to supplement their certificate of self-insurance with an agreement accepting this responsibility. *Id.* By reducing the damages to $25,000.00 in this case, the Eighth Circuit has ignored the requirements of Missouri statutory and case law and consequently has created disparate treatment between those who have liability coverage arising from their own contract of insurance and those who are provided liability coverage by companies who elect to self-insure.

A cause of action or claim for damages is an intangible property interest protected by the Fourteenth Amendment. *Tulsa Collection Servs. v. Pope*, 485 U.S. 478, 99 L. Ed. 2d 565, 108 S. Ct. 1340 (1988). The Eighth Circuit has deprived Kathleen Quick of her valuable claim through a constitutionally prohibited exercise of authority. By making fact determinations contrary to those previously made by a jury, the judges of the Eighth Circuit have deprived Kathleen Quick of a property interest.

Argument to the contrary might be persuasive if the position taken by the Eighth Circuit were even fairly debatable. It is not. There is no reasoned legal analysis which would support the Eighth Circuit's conclusions.

The Eighth Circuit's determination that a claim for bad faith is not assignable comes in the face of existing precedent to the contrary and, indeed, is without any supporting legal authority for the conclusion. For Missouri cases regarding assignability of claims see, e.g., *State ex rel Smith v. Greene*, 494 S.W.2d 55 (Mo. 1973); *State ex rel Park Nat'l Bank v. Globe Indemnity Co.*, 61 S.W.2d 733 (Mo. 1933); *Ganaway v. Shelter Mut. Ins. Co.*, 795 S.W.2d 554 (Mo.App. 1990); *Houston v. Wilhite*, 27 S.W.2d 772 (Mo.App. 1930). Missouri courts have held that claims arising out of breach of contract or fraud are assignable. Breach of fiduciary duty or "bad faith" claims are considered offshoots of fraud claims in Missouri. Bad faith claims such as that in issue in this case arise from the insurer's (Agency's) contractual obligation to defend and/or reasonably settle claims asserted against the insured (renter). Ironically, the Eighth Circuit itself previously has affirmed judgments obtained on assigned claims of bad faith asserted against liability insurers. *Luke*

v. American Family Mut. Ins. Co., 476 F.2d 1015 (8th Cir. 1973). The ruling of the Eighth Circuit in this case clearly is contrary to its own precedent.

Because a party must bring any and all claims arising out of the same transaction or occurrence in one suit, the Eighth Circuit's holding that bad faith claims are not assignable produces an anomalous result: When an insurer fails to perform its contractual duties, exposing the insured (renter) to a judgment in excess of available liability coverage, according to the Eighth Circuit the insured may not assign all of his potentially valuable claims in an effort to protect his personal assets. The decision of the Eighth Circuit effectively implies that a cause for action may be split, i.e., that part of the cause which may be premised upon breach of contract may be assigned to a judgment creditor, whereas a claim for bad faith may not be assigned. This is in spite of the fact that a bad faith theory of recovery arises out of breach of the same voluntary contractual relationship. Further, under long standing precedent, should the insured assign only that part of his cause premised on a breach of contract theory, and should the assigned theory be prosecuted, the insured (renter and judgment debtor) could be barred from asserting any other theory of recovery in a separate suit under principles of res judicata, collateral estoppel and the rule against splitting a cause of action.

If Wilhite's claims arising from Agency's breach of its contractual relationship represented an intangible property interest as this Court held in *Tulsa Collection Servs. v. Pope*, 485 U.S. 478, then certainly the claims or theories of recovery denominated as breach of contract and bad faith

which he sought to assign to Kathleen Quick should have been held to be properly assigned. Missouri case law supports the assignment. Contrary to the opinion of the Eighth Circuit, there is in fact no Missouri case law which indicates otherwise.

The Eighth Circuit's ruling on the merits of the bad faith claim after concluding that the claim was not properly before it or the trial court was improper (this error assumes the correctness of the decision that the bad faith claim was not properly assigned to Kathleen Quick). See, *Singleton v. Wulff*, 428 U.S. 150, 49 L. Ed. 2d 826, 96 S. Ct. 2868 (1976). Further, the Eighth Circuit's finding error and grounds for reversal where no error had been complained of in trial, post-trial motions, or on appeal was beyond the Court's authority. *Singleton v. Wulff*, 428 U.S. 150, *supra*; *Kelley v. Crunk*, 713 F.2d 426 (8th Cir. 1983); *Green v. American Airlines, Inc.*, 804 F.2d 453, *supra*. All of these departures from the usual course of appellate practice deserve this Court's attention, clarification and admonition.

The fiduciary relationship which exists between an insured and an insuror, once a liability claim is asserted, also deserves attention from this Court. Presently, this issue is particularly important because most states now have a mandatory automobile liability insurance law requiring a licensed driver to maintain some type of liability insurance at all times as an incident and prerequisite to the ability to lawfully operate an automobile upon public streets and highways. Thus, automobile liability insurors benefit from a legislatively mandated market for their products and services.

Actions by our courts and judges may result in just as much of a deprivation of constitutional rights as acts of states or private individuals acting with authority of the government. *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, *supra*. Deprivation of constitutional rights visited upon individuals by judicial fiat must be corrected by appellate review. The only available appellate review and opportunity for redress of unconstitutional conduct of the Eighth Circuit is before the United States Supreme Court. Otherwise, Kathleen Quick shall be denied her opportunity for redress of an unconstitutional deprivation of rights.

The Eighth Circuit, by its opinion in this case, has gone beyond the standard measure of appellate review. This situation should be remedied. The power to grant or withhold a remedy now lies solely with this Court. It is respectfully suggested that the Petition for Writ of Certiorari should be granted.

CONCLUSION

The blatant deviation from existing law and infringement of the Seventh and Fourteenth Amendments to the United States Constitution beg for the exercise of this Court's power of supervision.

For all the reasons stated, petitioner, Kathleen Quick, requests this Court to grant a Writ of Certiorari to review the decision of United States Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Nos. 94-3989/95-1045

Kathleen Quick, assignee of Kendrick Wilhite, Appellee, v. National Auto Credit, formerly known as Agency Rent-A-Car, Inc., Appellant.	*	Appeals from the United States District Court for the Western District of Missouri.
Missouri Organization of Defense Lawyers, Amicus Curiae.	*	
Enterprise Rent-A-Car, Inc.,[1] Amicus Curiae.	*	

Submitted: May 17, 1995

Filed: September 12, 1995

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[1] The motion of Enterprise Rent-A-Car, Inc., for leave to file an amicus curiae brief is granted.

Before McMILLIAN, BEAM, and HANSEN, Circuit Judges.

BEAM, Circuit Judge.

In July 1992, Kendrick Wilhite was involved in a car accident while driving a vehicle leased to him by Agency Rent-a-Car (Agency). A wrongful death action stemming from the accident was filed against Wilhite. Without an appearance by Wilhite or anyone on his behalf, a default judgment was entered. The wrongful death plaintiffs obtained an assignment of Wilhite's claims against Agency and prosecuted the present action, alleging breach of contract and bad faith refusal to settle. A jury found Agency liable, and the district court denied various post-trial motions. Agency appeals. We affirm in part, reverse in part, and remand with directions.

I. BACKGROUND

In July 1992, Wilhite rented a car from Agency in Lincoln, Nebraska, so that he could drive to his home in St. Louis, Missouri. On the return trip to Lincoln, Wilhite was involved in a car accident in Missouri. Eleven-year-old Anne Quick was killed in the accident. Others were injured in varying degrees.

Anne's mother, Kathleen Quick, retained Cynthia MacPherson to handle the wrongful death claim. One week after the accident, MacPherson contacted Agency and spoke with Steve Ockajick, who worked in Agency's claims department. MacPherson testified that she offered

to accept $25,000 from Agency, the amount of protection afforded by the rental contract.

Two weeks later, Ockajick sent Wilhite a letter informing him that the maximum protection under the rental agreement was $25,000 per person and $50,000 per occurrence. The letter notified Wilhite that portions of the claims might exceed these limits and advised him to contact his insurance carrier and personal legal counsel. Wilhite acknowledges receiving this letter.

Between September 1992 and March 1993, MacPherson and other counsel for Kathleen Quick attempted to negotiate with Agency and settle the claim.[2] When these attempts failed, Quick filed the wrongful death action against Wilhite. On March 23, 1993, Wilhite was served with a summons and petition. Wilhite did not notify Agency of the summons and did nothing on his own.

On March 30, 1993, MacPherson called Ockajick. She informed Ockajick that the wrongful death action had been filed in Wright County, that Wilhite had been served process, and that time was running for an answer to be filed. Ockajick told MacPherson that he had turned the file over to the legal department and that someone would get back to her once the file had been reviewed.

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[2] There is some dispute as to whether Quick's lawyers ever offered to provide Wilhite a release of all claims in return for the $25,000 payment or, if they did, when this occurred. The jury apparently concluded that a settlement for $25,000 would have been possible before default. For the purposes of this appeal, we assume the accuracy of this factual determination.

After speaking to MacPherson, Ockajick called Wilhite and left a message on his answering machine asking Wilhite to return the call. Wilhite testified that he never received the message from Ockajick. He also testified that when his roommates came home before him, they would sometimes erase the messages and sometimes leave them on the tape.

As indicated, no appearance was entered in the wrongful death action. On April 27, 1993, a default judgment was rendered against Wilhite for $6.5 million. Agency learned of the default judgment one week later. Agency then attempted unsuccessfully, to contact Wilhite.

On September 23, 1993, Wilhite and Quick entered into an agreement. Under the terms of the agreement, Wilhite assigned to Quick his claims against Agency. In return, Quick agreed to forbear enforcing the judgment against Wilhite "until and unless all legal and equitable remedies are exhausted against Agency."

In November 1993, Quick, as assignee for Wilhite, filed the present diversity action in federal district court. Quick alleged that Agency had breached its contract with Wilhite by failing to defend him in the wrongful death action and that Agency had acted in bad faith by refusing to settle within the contractual limits prior to the entry of default judgment. Agency filed a declaratory judgment action in state court. Agency asked the district court to stay the trial until the declaratory judgment action was concluded, but the district court refused.

The trial was held in September 1994 and the jury returned a verdict in favor of Quick. The jury awarded Quick $6.5 million in actual damages, plus interest from

the date of the default judgment, and $885,000 in exemplary damages.[3] In addition, the district court enjoined Agency from proceeding with the declaratory judgment action in state court. Agency filed a motion for new trial or, in the alternative, for judgment as a matter of law. The district court denied the motion.

II. DISCUSSION

In Missouri, a breach of the duty to defend sounds in contract, while a breach of the duty to settle sounds in tort.[4] *Ganaway v. Shelter Mut. Ins. Co.*, 795 S.W.2d 554, 556 (Mo. Ct. App.1990); *Landie v. Century Indem. Co.*, 390 S.W.2d 558, 562-63 (Mo. Ct. App. 1965). The district court denied Agency judgment as a matter of law on both the breach of contract and the bad faith claims. We review these denials de novo. *Chicago Title Ins. Co. v. Resolution Trust Corp.*, 53 F.3d 899, 904 (8th Cir. 1995).

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[3] The jury instructions allowed the jury to return a verdict in favor of Quick if the jury found either breach of contract or bad faith. Although the verdict form did not require the jury to indicate the basis of liability, the jury's award of exemplary damages is telling. Missouri law permits exemplary damages in a breach of contract action if the breaching party's conduct amounts to a separate, independent tort, or in other circumstances not relevant here. *Peterson v. Continental Boiler Works, Inc.*, 783 S.W.2d 896, 902-03 (Mo. 1990) (en banc). Because the jury awarded exemplary damages, we assume that the jury rendered its verdict, at least in part, on the basis of the bad faith claim. Our holding in this appeal eliminates exemplary damages as an element of the breach of contract cause of action.

[4] The district court ruled that Missouri law, not Nebraska law, was applicable. Although probably incorrect, neither party has appealed that ruling.

A. Breach of Contract

In its brief, Agency concedes that under the rental contract it had a duty to defend Wilhite up to the limits of the protection provided by the contract. Agency breached this duty by failing to arrange for counsel to enter an appearance for Wilhite in the wrongful death action. Agency contends, however, that the breach of contract claim should not have been submitted to the jury because Wilhite failed to plead or prove that he substantially performed the contract. The contract requires Wilhite to "fully cooperate" with Agency in investigating and defending claims arising from his use of the rental car but does not specifically require him to notify Agency of receipt of summons. Nevertheless, Agency argues that Wilhite violated the cooperation clause by failing to notify Agency of service of process.[5] We disagree.

Well within the time to plead, Agency was informed that a petition had been filed and that Wilhite had been served. Agency could have verified this information with a single phone call to the clerk of court. Under these circumstances, Wilhite's failure to notify Agency did not constitute a violation of the cooperation clause. *See Thompson v. Columbia Mut. Ins. Co.*, 820 S.W.2d 626, 632 (Mo. Ct. App. 1991) (holding that insured did not violate cooperation clause, despite failure to notify of service, when insurer had a copy of the petition within the time to plead). Agency is not entitled to judgment as a matter of

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[5] Agency also argues that Wilhite was uncooperative in failing to appear or take any steps to prevent the default judgment and in failing to assist in setting aside the default judgment. These arguments are without merit.

law on the breach of contract claim. Therefore, Agency is liable for the protection Quick was due under the rental contract – $25,000.

B. Bad Faith

Agency contends that the bad faith claim should not have been submitted to the jury. In support of this contention, Agency presents several arguments related to the substance of the bad faith claim.

Agency first argues that demand by the insured is an essential element of a bad faith claim and that Quick has failed to establish such a demand. Missouri has long recognized the tort of bad faith failure to settle. *See Zumwalt v. Utilities Ins. Co.*, 228 S.W.2d 750, 755 (Mo. 1950). Missouri courts have generally held that a bad faith plaintiff must prove, among other things, that "the insured has demanded that the insurer settle the claim brought against the insured." *See. e.g., Dyer v. General Am. Life Ins. Co.*, 541 S.W.2d 702, 704 (Mo. Ct. App. 1976). Nevertheless, some Missouri opinions have suggested that demand is not required if the insurer has failed to notify the insured of an offer of settlement. *See Ganaway*, 795 S.W.2d at 564 ("[I]f the insured were not advised of the offers of settlement, he could not have demanded that the offer be accepted."); *c.f. State Farm Fire & Cas. Co. v. Metcalf*, 861 S.W.2d 751, 758 (Mo. Ct. App. 1993) (Shrum, J., concurring) (stating that if insurer has thwarted possibility of demand, then insurer should be estopped from arguing lack of demand).

Agency did not notify Wilhite of Quick's offers to settle the claim within the policy limits. In fact, after

Agency had been informed of the pending wrongful death action and before the entry of default judgment, Agency made only one attempt to contact Wilhite, leaving a message on his answering machine and apparently giving up when Wilhite failed to respond. In these circumstances, we are reluctant to find that Quick's claim fails for lack of a demand although that may be the law of Missouri. For the sake of discussion of other issues, we will assume, without deciding, that Wilhite was not required to demand settlement. Agency also argues that it is not an insurance company and, as such, it is not liable for a bad faith failure to settle. On a simplistic level, Agency is partially correct. Agency is a rental car company, not an insurance company, and it has not attempted to comply with the innumerable statutes and regulations governing the business of insurance. Quick would have us hold that, because Agency is a qualified "self-insurer" under Missouri's Motor Vehicle Financial Responsibility Law, Agency is the functional equivalent of an insurance company, and thus a bad faith claim will lie. Such a holding would be contrary to the teachings of the Missouri Supreme Court.

According to Missouri's Motor Vehicle Financial Responsibility Law, a self-insurer must promise to pay the same judgments in the same amounts as an insurer would be obligated to pay. Mo. Rev. Stat. § 303.160.1(4). The Missouri Supreme Court has recognized, however, that a self-insurer does not automatically assume all the rights and duties that would exist under an insurance policy. *American Family Mut. Ins. Co. v. Missouri Power & Light Co.*, 517 S.W.2d 110, 113-14 (Mo. 1974) (en banc). The

Motor Vehicle Financial Responsibility Law assures financial remuneration to injured parties; it obliges owners to protect the public from judgment-proof drivers by ensuring certain minimum payments. *Id.* at 113. Self-insurance is confined to this obligation. *Id.* The self-insurer's guarantee to pay any judgment operates in favor of the state and the injured party, and does not in any sense operate for the benefit of the negligent driver *Id.* at 114. Accordingly, Agency's status as a self-insurer does not transform it into an insurance company with obligations of indemnity to its lessee.

Ultimately, however, Agency's status as a self-insurer or an insurance company is not determinative. A cause of action for bad faith failure to settle is based not on the defendant's status as a liability insurer but, rather, on a particular balance of power. When one party assumes control of the right to settle claims, then that party has the duty to exercise good faith in considering offers to compromise the claim. *Ganaway*, 795 S.W.2d at 556. In other words, an action for bad faith refusal to settle does not lie unless the defendant reserved to itself the exclusive right to accept an offer to compromise a claim and to settle a dispute. *See Zumwalt*, 228 S.W.2d at 753; *Ganaway*, 795 S.W.2d at 557.

Whether such a reservation exists depends on the specific language of the contract at issue. In *Ganaway*, the Missouri Court of Appeals found that the insurer had reserved to itself the right to settle claims. The Ganaway liability insurance contract provided, in part:

> [T]he Company shall defend any suit alleging [covered] bodily injury or property damage and seeking damages which are payable under the

> terms of this policy, even if any of the allegations of the suit are groundless, false, or fraudulent; but the Company may make such investigation or settlement of any claim or suit that it deems expedient. . . .
>
> The insured shall not, except at his own cost, voluntarily make any payment, assume any obligation, or incur any expense other than for such immediate medical or surgical relief to others as shall be imperative at the time of the accident.

795 S.W.2d at 556-57. In contrast, the Agency rental contract language at issue in the present action provides:

> [Agency] will settle or defend as it considers appropriate, any claim or suit seeking damages for bodily injury and/or property damage up to the MINIMUM dollar amount required for any one (1) rental automobile, per occurrence, in accordance with the applicable motor vehicle financial responsibility laws of the state in which this agreement of rental was executed by the parties hereto. In addition to our limits of liability, we will pay all defense costs we incur. Our duty to settle or defend shall end when our limits of liability for this coverage have been exhausted by tendering such limits in any manner, eg. [sic] to excess carrier.

Appellee's App. at 115.

A comparison of these two contract provisions reveals that the latter does not reserve to Agency the exclusive right to settle claims. First, the contract in *Ganaway* required the insurer to consider settling even "groundless, false, or fraudulent" claims, but the rental contract does not require Agency to do the same. Second,

the *Ganaway* contract gave the insurer the power to settle any claim, while the rental contract gives Agency the power to settle claims only up to the specified limits. Third, and most significantly, the rental contract does not prevent the renter or the renter's liability insurance carrier from negotiating a settlement, and does not penalize the renter or the carrier for doing so. As such, Agency lacks the total control over the settlement process which would be necessary to impose upon Agency the duty to settle in good faith.

Because Agency did not have the exclusive right to settle claims arising from Wilhite's use of its rental car, Agency did not have a fiduciary duty to give good faith consideration to offers to settle. Agency could not have breached a fiduciary duty it did not have.

In addition to its substantive arguments, Agency argues that a bad faith claim is not assignable. In Missouri, the general rule is that causes of action are assignable if they survive to the personal representative. *Beall v. Farmers, Exch. Bank*, 76 S.W.2d 1098, 1099 (Mo. 1934); *Property Exch. & Sales, Inc. v. Bozarth* 778 S.W.2d 1, 2 n.1 (Mo. Ct. App. 1989). An exception to this general rule exists. Although personal injury actions survive, *see* Mo. Rev. Stat. § 537.020, they are not assignable, *Beall*, 76 S.W.2d at 1099; *Bozarth*, 778 S.W.2d at 2 n.1; *Forsthove v. Hardware Dealers Mut. Fire Ins. Co.*, 416 S.W.2d 208, 217 (Mo. Ct. App. 1967). *See also Eastern Atl. Transp. & Mech. Eng'g, Inc. v. Dingman*, 727 S.W.2d 418, 423 (Mo. Ct. App. 1987) (holding that a tort claim is assignable to the extent that it provides the basis for an award of exemplary damages in an otherwise assignable action for breach of

contract). Under this scheme, Wilhite's bad faith cause of action is not assignable.

However, this result is cast into doubt by *Ganaway*. In *Ganaway*, the Missouri Court of Appeals upheld a bankruptcy trustee's assignment of the debtor's bad faith claim. The court reasoned that, under the 1978 Bankruptcy Act, all legal and equitable interests of the debtor, including causes of action, became a part of the bankruptcy estate. The court then stated that "the general law" allows a bad faith claim to be assigned to a judgment creditor either by the insured or by a bankruptcy trustee. 795 S.W.2d at 565 (citing only Annotation, *Assignability of Insured's Right to Recover over Against Liability Insurer for Rejection of Settlement Offer*, 12 A.L.R 3d 1158 (1967)).

The conflict between *Ganaway* and the other Missouri precedent is clear: under *Ganaway*, Wilhite's claim is assignable, while under the other cases, it is not. We think, however, that *Ganaway* runs upstream from clearly established Missouri law. *See Forsthove*, 416 S.W.2d at 217. *Ganaway* is further distinguishable because it involves an often stated exception to nonassignability, statutory authorization (through the bankruptcy act). *See Forsthove*, 416 S.W.2d 216 (unless otherwise provided by statute, claim for damages for personal tort is, at law, nonassignable). Accordingly, we hold that Wilhite's bad faith cause was nonassignable. Thus, Agency is entitled to judgment as a matter of law on this claim.

C. Other

In its brief, Agency has presented a number of additional arguments addressing, among other things, certain evidentiary rulings and jury instructions. Having carefully considered all of the arguments and issues, we find that those arguments not mooted by the foregoing discussion are without merit.

III. CONCLUSION

The district court denied Agency judgment as a matter of law on both claims. We conclude that Agency is not entitled to judgment as a matter of law on the breach of contract claim, but is so entitled on the bad faith claim. Accordingly, the judgment of the district court is affirmed in part and reversed in part. The cause is remanded with directions to enter judgment in the amount of $25,000 plus interest as provided by law in favor of Quick.

McMILLIAN, Circuit Judge, specially concurring.

I concur in the panel opinion on the breach of the duty to defend and the nonassignability of the bad faith refusal to settle issues. I write separately, however, because I do not agree that Agency as a certified self-insurer has no duty to settle. I do not think the Missouri legislature intended self-insurers to escape certain liabilities, such as for breach of the duty to settle, that would attach to third-party insurers.

As noted by the panel opinion, slip op. at 7, Agency is a car rental company, not an insurance company. It is a self-insurer under Missouri law. For the reasons discussed below, I think a self-insurer is much closer to an

insurance company than does the panel opinion, particularly with respect to the duty to settle.

First, I would construe the rental contract to reserve to Agency a sufficient degree of control of the right to settle claims, although admittedly not an expressly exclusive right, especially when considered in light of the other provisions of the rental contract as well as Agency's actions under the rental contract. As noted by the panel opinion, *id.* at 8-9, the rental contract in the present case does not use language as restrictive as that in *Ganaway v. Shelter Mutual Insurance Co.*, 795 S.W.2d 554, 556 (Mo. Ct. App. 1990) (*Ganaway*), much less as restrictive as that in *Zumwalt v. Utilities Insurance Co.*, 360 Mo. 362, 228 S.W.2d 750, 752 (1950). Nonetheless, the rental contract does provide that "Agency will settle or defend, as it considers appropriate, any claim or suit seeking damages" and does not qualify or condition settlement or defense upon any notification or consultation with the lessee (the car rental customer). As noted by the panel opinion, slip op. at 9, the rental agreement does not expressly prohibit the customer, or the customer's insurer, from negotiating a settlement. The rental contract does not contain a provision like that in *Ganaway* explicitly barring the insured, except at his or her own cost, from voluntarily making any payment, assuming any obligation or incurring any expense there than for immediate medical expenses. 795 S.W.2d at 557. The rental contract does, however, provide that its indemnification and hold harmless agreement "shall not apply . . . to any obligation assumed by the Customer or driver under any contract of whatever nature," a condition which arguably would penalize the

customer, or the customer's insurer, from negotiating a settlement, without the approval of Agency.

Other provisions of the rental contract support an insurance relationship. The rental contract includes an indemnification agreement under which Agency agrees to protect the customer against claims for damages for bodily injury or property damage, up to the minimum dollar amount required for one rental automobile per occurrence, as required by the applicable motor vehicle financial responsibility law. The rental contract also requires customers to notify Agency of any accidents occurring while they operate the rental vehicles and to cooperate with Agency, its agents or employees in the investigation, defense or prosecution of any claim or legal proceeding arising out of the operation or use of the rental vehicle. Agency investigates claims made by injured persons against its customers and employs claims adjusters and attorneys to investigate and resolve those claims.

Here, Agency has conceded that under the rental contract it had a duty to defend its customers, up to the limits of its liability. Agency's claims adjuster investigated the accident, negotiated with plaintiff's representatives about a possible settlement, and consulted Agency's legal department about the settlement. In addition, during the litigation of the present case, Agency advanced defenses typical of insurers, such as failure to notify and failure to cooperate, as well as failure to make a demand for settlement.

Next, as noted by the panel opinion, under Missouri law, self-insurers do not automatically assume all the

rights and duties that would exist under an insurance policy. Slip op. at 7, *citing American Family Mutual Insurance Co. v. Missouri Power & Light Co.*, 517 S.W.2d 110, 113-14 (Mo. 1974) (banc) (*Missouri Power*). I have no quarrel with *Missouri Power* under the facts of that case. I would not, however, read *Missouri Power* to permit a self-insured to escape liability under the facts of the present case.

In *Missouri Power* an employee had an accident while driving a company car, with the employer's permission, on personal business. The employer was a self-insurer. The Missouri Supreme Court held that the employer's statutory obligation, as a self-insurer, to pay the same judgments and in the same amounts that an insurer would have been obligated to pay under an owner's motor vehicle liability policy if it had issued such a policy to said self-insurer, did not constitute "other valid and collectible insurance" within the meaning of the employee's liability policy. *Id.*, *citing Home Indemnity Co. v. Humble Oil & Refining Co.*, 314 S.W.2d 861, 865-66 (Tex. Ct. Civ. App. 1958) (*Humble Oil*) The majority opinion in *Missouri Power* emphasized the employee-employer relationship, the employer's lack of liability at common law for an accident involving an employee that occurred outside the scope of employment, the employee's primary liability at common law for his negligent driving, and the inability of the employee, and the employee's insurer, to recoup damages paid for the employee's negligence from the employer. 517 S.W.2d at 113-14, *citing Humble Oil*, 314 S.W.2d at 865-66. The dissenting opinion criticized what it characterized as the majority opinions unsuccessful "attempt to mix apples and oranges – the general rule as

to indemnity in a respondeat superior situation with liability of an insurer under the standard omnibus clause." 517 S.W.2d at 114 (Seiler, J., dissenting); *see Hillegass v. Landwehr*, 176 Wis. 2d 76, 499 N.W.2d 652 (1993) (*Hillegass*) (employee-employer context; holding self-insurer provided "insurance" within meaning of other insurance clause in liability policy).

I believe the dissenting opinion in *Missouri Power* has the better argument.[1] Accepting the analysis of the majority opinion, however, I would distinguish *Missouri Power* from the present case on its facts, that is, the absence of the employee-employer relationship emphasized by the majority opinion in *Missouri Power*. In the customer-car rental agency context, concerns about the doctrine of respondeat superior and employer liability for an employee's personal business outside the scope of employment are irrelevant. Despite Agency's disclaimer that it is not an insurance company, the rental contract and Agency's actions establish that Agency functions substantially like an insurance company, at least with respect to indemnification and settlement of claims against its customers. It is irrelevant to the customer

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[1] The Missouri motor vehicle financial responsibility statute defines "motor vehicle liability policy" to include the usual omnibus coverage found in the standard automobile liability policy whereby the insurer covers the named insured and also any other person using any of the specified motor vehicles with the permission of the named insured. Mo. Stat. Rev. § 303.190 (1994). The statute also provides that the self-insurer will pay the same judgments and amounts that an insurer would have been obligated to pay under an owner's motor vehicle liability policy had it issued one to the self-insurer. *Id.* § 303.160.1(4).

whether the car rental agency is self-insured or obtains insurance from a third-party. *See Missouri Power*, 517 S.W.2d at 114-17 (Seiler, J., dissenting); *Hillegass*, 176 Wis. 2d at 82-86, 499 N.W.2d at 655-56 (same); *see also Gavaghan v. Replacement Rent-A-Car. Inc.*, 811 F. Supp. 1077, 1081 (E.D. Pa. 1992) (Pennsylvania law; rental car customer); *Nathanson v. Hertz Corp.*, 183 Cal. App. 3d 78, 84, 227 Cal. Rptr. 799, 803 (1986) (California law; rental car customer); *Chambers v. Agency Rent-A-Car, Inc.*, 878 P.2d 1164, 1165-67 & n.4 (Utah Ct. App. § 994) (Utah law; rental car customer).

> [T]he legislative decision to permit companies to select the manner in which they are to be "insured" or financially responsible for liability to others should not be confused with [the self-insurer's] contention that self-insured companies be permitted to avoid the obligations and duties that arise from operating motor vehicles [within the state]. Insofar as [the self-insurer] operates motor vehicles within the state . . . , it is subject to the risks and liabilities attending that operation – whether it self-retains the risk or contractually shifts the risk to a third-party.

Hillegass, 176 Wis. 2d at 83, 499 N.W.2d at 655.

The cases cited involved liability claims, not claims for bad faith refusal to settle. Nonetheless, I think a self-insurer should be required to pay both liability claims and any claims related to its mishandling of those liability claims to the same extent as would a third-party insurer.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
SOUTHERN DIVISION

JUDGMENT IN A CIVIL CASE

KATHLEEN QUICK, an individual, assignee of Kendrick Wilhite vs. AGENCY RENT-A-CAR, INC.	Case No. 93-3455-CV-S-4 (Filed Sept. 28, 1994)

xxx **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

___ **Decision by Court.** This action came to trial/hearing/a determination before the Court. The issues have been tried/heard/determined and a decision has been rendered.

IT IS ORDERED AND ADJUDGED on the claim of plaintiff, Kathleen Quick, against defendant, Agency Rent-A-Car, Inc., judgment is entered in favor of plaintiff, Kathleen Quick. The damages of plaintiff Kathleen Quick are as follows: actual damages of $6,500,000.00, together with interest thereon at the rate of 9% per annum from April 27, 1993, and exemplary damages of $885,000.00.

September 28, 1994 Date	R. F. CONNOR Clerk
Entered on: September 28, 1994	/s/ Janis J. McBurney (By) Deputy Clerk

Kathleen QUICK, Plaintiff-Respondent,

v.

Kendrick Carmel WILHITE, Defendant,

and

Agency Rent-A-Car, Inc.,
Intervenor-Appellant.

No. 19524.

Missouri Court of Appeals,
Southern District,
Division Two.

Jan 18, 1995.

Motion for Rehearing and/or Transfer to Supreme Court Denied Feb. 21, 1995.

Application to Transfer Denied
April 25, 1995.

Self-insured car rental company sought to intervene in suit arising from accident involving rented car. The Circuit Court, Wright County, John G. Moody, Associate Judge, denied motion to intervene, and rental company appealed. The Court of Appeals, Prewitt, J., held that rental company lacked direct interest that would entitle it to intervene.

Affirmed.

Kenneth A. Slavens and James B. James, St. Louis, for intervenor-appellant.

Thomas W. Millington, James W. Newberry, Springfield, for plaintiff-respondent.

PREWITT, Judge.

On April 27, 1993, plaintiff obtained a default judgment against defendant for 6.5 million dollars. Plaintiff's claims arose from an automobile collision in which defendant was operating a vehicle he rented from appellant. On March 24, 1995, appellant sought to intervene in the matter, alleging that it "is a self-insurer under the laws of the states of the States of Missouri and Nebraska and would be called upon for indemnification of any judgments against Kendrick Carmel Wilhite for actions arising from his operation of the . . . vehicle". The trial court denied the motion to intervene.

Appellant appeals, contending that it could intervene as a matter of right under Rule 52.12(a). Appellant states in its first point that it "had an interest relating to the property or transaction which is the subject matter of the action; the disposition of the action as a practical matter impaired and impeded agency's ability to protect that interest and; agency's interest was inadequately represented by the existing parties and as a matter of law the trial court should have granted agency's motion to intervene."

As stated in *Whitehead v. Lakeside Hosp. Ass'n*, 844 S.W.2d 475, 479 (Mo.App.1992), Missouri courts have previously determined:

> "The liability of an insurer as potential indemnitor of the judgment debtor does not constitute a direct interest in such a judgment so as to implicate intervention as of right in that action. Rule 52.12(a). That is because the insurer does not either 'gain or lose from the direct operation of that judgment.' *State ex rel. Farmers Mut. Auto*

> *Ins. Co. v. Weber*, 364 Mo. 1159, 273 S.W.2d [318,] at 321[4]. An insurer does not have an interest that implicates the rule until the insurer is called upon to make indemnity as to the judgment. It is when a claim for potential indemnity becomes a demand for actual indemnity that the direct interest [right] of the insurer to intervene in the other action accrues. That 'interest' is 'only, and nothing more than, the right to some day in some proper forum and cause litigate its liability upon its above policy.' 364 Mo. 1159, 273 S.W.2d at 322."[1]

Appellant relies extensively upon the *Frost* cases cited in note 2 below. However, those cases both involved uninsured motorist coverage and not liability coverage. The right to intervene, in uninsured motorist cases is necessarily different. *See Oates v. Safeco Ins. Co.*, 583 S.W.2d 713, 719 (Mo. banc 1979). *See also State ex rel. State Farm Mut. Automobile Ins. Co. v. Craig*, 364 S.W.2d 343, 346-349 (*Weber*, upon whom *Whitehead* primarily relies distinguished in uninsured motorist case).

In this case appellant's position is essentially that of a liability insurance carrier. *See Gage & Tucker v. Director of Revenue*, 769 S.W.2d 119, 122-123 (Mo. banc 1989). We conclude *Whitehead* and the cases therein discussed control. The trial court correctly denied appellant's motion to intervene.

With its motion to intervene appellant also filed motion to set aside the judgment. Appellant's remaining two points pertain to the trial court's refusal to rule on

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[1] *Eakins v. Burton*, 423 S.W.2d 787 (Mo.1968), has a similar holding which also supports the trial court.

the motion and set aside the judgment. As we determine that the trial court did not err in refusing to allow appellant to intervene, we need not rule those points.[2]

The judgment is affirmed.

PARRISH and CROW, JJ., concur.

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[2] Nor do we determine whether the trial court could deny the motion to intervene because it was not, as respondent contends, timely filed.

NOV 6 1995

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 94-3989/95-1045WMS

Kathleen Quick, etc.,	*	
	*	
Appellee,	*	Order Denying
vs.	*	Petition for
National Auto Credit, etc.,	*	Rehearing and
	*	Suggestion for
Appellant.	*	Rehearing En Banc
	*	
	*	
Missouri Organization of	*	
Defense Lawyers,	*	
	*	
Amicus Curiae.		

The suggestion for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

November 2, 1995

Order Entered at the Direction of the Court:

/s/ Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit

AMENDMENT VII

Civil Trials

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

AMENDMENT XIV

Section 1. Citizens of the United States

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

303.160. Proof of financial responsibility, how given. – 1. Proof of financial responsibility when required under this chapter with respect to a motor vehicle or with respect to a person who is not the owner of a motor vehicle may be given by filing:

(1) A certificate of insurance as provided in section 303.170 or section 303.180; or

(2) A bond as provided in section 303.230; or

(3) A certificate of deposit of money or securities as provided in section 303.240; or

(4) A certificate of self-insurance, as provided in section 303.220, supplemented by an agreement by the self-insurer that, with respect to accidents occurring while the certificate is in force, he will pay the same judgments and in the same amounts that an insurer would have been obligated to pay under an owner's motor vehicle liability policy if it had issued such a policy to said self-insurer.

2. No motor vehicle shall be or continue to be registered in the name of any person required to file proof of financial responsibility unless such proof shall be furnished for such motor vehicle.

303.220. Certificate of self-insurance – cancelled, when. – 1. Any religious denomination which has more than twenty-five members with motor vehicles and prohibits its members from purchasing insurance, of any form, as being contrary to its religious tenents, may qualify as a self-insurer by obtaining a self-insurance certificate issued by the director as provided in subsection 3 of this section.

2. Any person in whose name more than twenty-five motor vehicles are registered may qualify as a self-insurer by obtaining a certificate of self-insurance issued by the director as provided in subsection 3 of this section.

3. The director may, in his discretion, upon the application of any religious denomination or person described in subsection 1 or 2 of this section, issue a certificate of self-insurance when he is satisfied that such religious denomination or person is possessed and will continue to be possessed of the ability to pay judgments obtained against such religious denomination or person.

4. Upon not less than ten days' notice and a hearing pursuant to such notice, the director may, upon reasonable grounds, cancel a certificate of self-insurance. Failure to pay any judgment within thirty days after such judgment shall have become final shall constitute a reasonable ground for the cancellation of a certificate of self-insurance.

303.190. Motor vehicle liability policy, contents

1. A "**motor vehicle liability policy**" as said term is used in this chapter shall mean an owner's or an operator's policy of liability insurance, certified as provided in section 303.170 or section 303.180 as proof of financial responsibility, and issued, except as otherwise provided in section 303.180 by an insurance carrier duly authorized to transact business in this state, to or for the benefit of the person named therein as insured.

2. Such owner's policy of liability insurance:

(1) Shall designate by explicit description or by appropriate reference all motor vehicles with respect to which coverage is thereby to be granted; and

(2) Shall insure the person named therein and any other person, as insured, using any such motor vehicle or motor vehicles with the express or implied permission of such named insured, against loss from the liability imposed by law for damages arising out of the ownership, maintenance or use of such motor vehicle or motor vehicles within the United States of America or the Dominion of Canada, subject to limits, exclusive of interest and costs, with respect to each such motor vehicle, as follows: twenty-five thousand dollars because of bodily injury to or death of one person in any one accident and subject to said limit for one person, fifty thousand dollars because of bodily injury to or death of two or more persons in any one accident, and ten thousand dollars because of injury to or destruction of property of others in any one accident.

3. Such operator's policy of liability insurance shall insure the person named as insured therein against loss from the liability imposed upon him by law for damages arising out of the use by him of any motor vehicle not owned by him, within the said territorial limits and subject to the same limits of liability as are set forth above with respect to any owner's policy of liability insurance.

4. Such motor vehicle liability policy shall state the name and address of the named insured, the coverage afforded by the policy, the premium charged therefore, the policy period and the limits of liability, and shall contain an agreement or be endorsed that insurance is provided thereunder in accordance with the coverage defined in this chapter as respects bodily injury and death or property damage, or both, and is subject to all the provisions of this chapter.

5. Such motor vehicle liability policy need not insure any liability under any workers' compensation law nor any liability on account of bodily injury to or death of an employee of the insured while engaged in the employment, other than domestic, of the insured, or while engaged in the operation, maintenance or repair of any such motor vehicle nor any liability for damage to property owned by, rented to, in charge of or transported by the insured.

6. Every motor vehicle liability policy shall be subject to the following provisions which need not be contained therein:

(1) The liability of the insurance carrier with respect to the insurance required by this chapter shall become absolute whenever injury or damage covered by said

motor vehicle liability policy occurs; said policy may not be canceled or annulled as to such liability by any agreement between the insurance carrier and the insured after the occurrence of the injury or damage; no statement made by the insured or on his behalf and no violation of said policy shall defeat or void said policy;

(2) The satisfaction by the insured of a judgment for such injury or damage shall not be a condition precedent to the right or duty of the insurance carrier to make payment on account of such injury or damage;

(3) The insurance carrier shall have the right to settle any claim covered by the policy, and if such settlement is made in good faith, the amount thereof shall be deductible from the limits of liability specified in subdivision (2) of subsection 2 of this section;

(4) The policy, the written application thereof, if any, and any rider or endorsement which does not conflict with the provisions of this chapter shall constitute the entire contract between the parties.

7. Any policy which grants the coverage required for a motor vehicle liability policy may also grant any lawful coverage in excess of or in addition to the coverage specified for a motor vehicle liability policy and such excess or additional coverage shall not be subject to the provisions of this chapter. With respect to a policy which grants such excess or additional coverage the term "**motor vehicle liability policy**" shall apply only to that part of the coverage which is required by this section.

8. Any motor vehicle liability policy may provide that the insured shall reimburse the insurance carrier for

any payment the insurance carrier would not have been obligated to make under the terms of the policy except for the provisions of this chapter.

9. Any motor vehicle liability policy may provide for the prorating of the insurance thereunder with other valid and collectible insurance.

10. The requirements of a motor vehicle liability policy may be fulfilled by the policies of one or more insurance carriers which policies together meet such requirements.

11. Any binder issued pending the issuance of a motor vehicle liability policy shall be deemed to fulfill the requirement for such a policy.

AGREEMENT TO PAY JUDGMENTS

I, Louis H. Rice, as a self-insurer pursuant to the provisions of Mo. Stat. 303.160.1(4) (1986), hereby agree, with respect to accidents occurring while the certificate of self-insurance is in force, to pay the same judgments and in the same amounts that an insurer would have been obligated to pay under an owner's motor vehicle liability policy if such a policy had been issued to Agency Rent-A-Car, Inc. (self-insured), as required by Mo. Rev. Stat. 303.160.1(4) and 303.220, (1986).

Agency Rent-A-Car, Inc.
Self-Insured Company

/s/ Louis H. Rice
By Louis H. Rice

May 6, 1993
Date

SUBSCRIBED AND SWORN TO BEFORE ME THIS 6TH DAY OF May 1993, TO CERTIFY WHICH, WITNESS BY HAND AND SEAL OF

/s/ CLM
NOTARY PUBLIC

Charles L. Morrow, Esq.
NOTARY PUBLIC, STATE OF OHIO
COMMISSION HAS NO EXP. DATE
R.C. 147.03

ASSIGNMENT

THIS AGREEMENT, dated this 23rd day of September, 1993, by and between Kendrick Carmel Wilhite and Kathleen Quick.

WITNESSETH:

1. Kendrick Carmel Wilhite, hereinafter referred to as assignor, hereby assigns, transfers and delivers to Kathleen Quick, all rights, title and interest in and to any claims or cause of action which he now has or may acquire in the future against Agency Rent-A-Car, Agency Rent-A-Car, Inc., their agents, insurers, assigns, corporate affiliates or any other business name or form under which they have or in the future conduct business as a result of (a) the bad faith conduct of Agency Rent-A-Car, whether arising in contract or tort, in refusing to settle or defend assignor in a claim asserted by Kathleen Quick against assignor for the wrongful death of her daughter, Anne Elizabeth Quick, and in refusing to settle or to defend assignor in a suit styled Kathleen Quick Plaintiff, vs. Kendrick Carmel Wilhite, Defendant, Wright County Case No. CV593-70CC; (b) any act or omission of Agency Rent-A-Car relating to its obligations regarding an automobile accident occurring on or about July 6, 1993, in Platte County, Missouri, in which Anne Elizabeth Quick was killed; or (c) the judgment entered against assignor in Case No. CV593-70CC.

2. In consideration of this assignment Kathleen Quick agrees that neither she nor any person, firm or corporation claiming by or through her will levy execution by attachment or garnishment against any wages, income or property of assignor until and unless all legal

and equitable remedies are exhausted against Agency Rent-A-Car; excluding any federal level appeals which Kathleen Quick elects not to pursue.

/s/ Kendrick C. Wilhite
Kendrick Carmel Wilhite

IN THE CIRCUIT COURT OF
WRIGHT COUNTY, MISSOURI
CIRCUIT DIVISION

KATHLEEN QUICK, Plaintiff, vs. KENDRICK CARMEL WILHITE, Defendant.	)	Case No. CV593-70CC (Filed Apr. 27, 1993)

JUDGEMENT

NOW on this 27th day of April 1993, this case comes on for hearing. The Plaintiff Kathleen Quick appears by counsel, Cynthia O. MacPherson. Defendant Kendrick Carmel Wilhite appears not. An *Interlocutory Order of Default* having been entered in this cause on the 23rd day of April 1993, and no party having requested a jury trial to assess damages, the Court now proceeds with a hearing on the issue of damages.

The Court having found that Defendant Kendrick Carmel Wilhite was served with a valid summons and Plaintiff's *Petition for Wrongful Death* on March 23, 1993, and that said Defendant failed to respond by filing a timely *Answer* to Plaintiff's *Petition for Wrongful Death* as required by Rule 55.25(a) VAMR, was in default. Further, the Court found all allegations in Plaintiff Kathleen Quick's *Petition for Wrongful Death* as taken as true and found in favor of Plaintiff Kathleen Quick and against Defendant Kendrick Carmel Wilhite on all claims asserted by Plaintiff Kathleen Quick and each of them.

The Court after having taken the issue of damages under advisement now proceeds to take up this matter on the issue of damages pursuant to Supreme Court Rule 74.05(b). The Court having heard extensive evidence as to the damages suffered by Plaintiff Kathleen Quick as a result of the death of her only daughter and after considering the extensive evidence and all statutory items of recoverable damages as set forth in §537.090 RSMo, the Court finds that a fair and just award for the death of Anne Elizabeth Quick and the losses thus occasioned to be Six Million Five Hundred Thousand Dollars ($6,500,000).

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED based on the pleadings and extensive evidence presented and considered by this Court regarding damages sustained that a *Judgment* for Plaintiff Kathleen Quick and against Defendant Kendrick Carmel Wilhite in the total amount of Six Million Five Hundred Thousand Dollars ($6,500,000) be entered for all statutory damages allowed pursuant to §537.090 RSMo which have been suffered by Plaintiff Kathleen Quick as a result of the death of Anne Elizabeth Quick; that interest on said *Judgment* accrue at the legal rate of Nine Percent (9%) from the date of this *Judgment*.

SO ORDERED this 27th day of April, 1993.

/s/ John Moody
JUDGE JOHN MOODY

[logo]

Deposition Exhibit 15

AGENCY RENT-A-CAR

This agreement is subject to the following terms and conditions:

1. Lessor will settle or defend, as it considers appropriate, any claim or suit seeking damages for bodily injury and or property damage up to the MINIMUM dollar amount required for any one (1) rental automobile, per occurrence, in accordance with the applicable motor vehicle financial responsibility laws of the state in which this agreement of rental was executed by the parties hereto. In addition to our limits of liability, we will pay all defense costs we incur. Our duty to settle or defend shall end when our limits of liability for this coverage have been exhausted by tendering such limits in any manner, eg. to excess carrier. The foregoing indemnification and hold harmless provisions shall be applicable only to losses arising out of the authorized use of the vehicle. Without limitation because of enumeration the aforesaid indemnification and Hold Harmless Agreement shall not apply (a) to any obligation for which the Customer or driver of the vehicle, or the employer of either or any insurance carrier, may be held liable under any workman's compensation or disability benefits law or under any similar law; (b) to any obligation assumed by the Customer or driver under any contract of whatever nature; (c) to any liability of Customer or driver, or employer of either, caused while the vehicle is being used for the transportation of persons or property for hire, expressed or implied. Lessor, as a qualified self-insurer, is not

an insurer and is not extending any insurance coverage to the Customer, either primary or excess, nor uninsured or underinsured coverages unless expressly required by the laws of the state in which this agreement of rental was executed. This coverage may not under any circumstances be stacked with any available other coverages and lessor shall be entitled to any and all set offs from other policies of automobile insurance, med pay policies, hospitalization or medical plans, PIP, worker's compensation benefits, and any other benefits that Customer may recover as a result of accidental injury.

2. Lessor agrees to indemnify and hold harmless Lessee or any additional listed driver and authorized operators only during the term of this Agreement for bodily injury, property damage, uninsured motorists and economic loss coverage up to the minimum mandatory Maryland Insurance requirements for any one (1) rental automobile, per occurrence.

3. LESSEE REPRESENTS AND WARRANTS THAT LESSEE SHALL DEFEND AND HOLD LESSOR HARMLESS FROM AND AGAINST ANY AND ALL LOSSES, LIABILITIES, DAMAGES, INJURIES, CLAIMS, DEMANDS, COSTS AND EXPENSES WHICH EXCEED THE LIMITS OF THE MINIMUM DOLLAR AMOUNT REQUIRED BY THE APPLICABLE MOTOR VEHICLE FINANCIAL RESPONSIBILITY LAWS OF THE STATE IN WHICH THIS AGREEMENT OF RENTAL WAS EXECUTED. LESSEE ALSO REPRESENTS AND WARRANTS THAT LESSEE SHALL SATISFY ALL FINES, PENALTIES, AND FORFEITURES, IMPOSED UNDER ANY FEDERAL, STATE OR MUNICIPAL STATUTE, LAW, ORDINANCE, RULE, REGULATION OR INSURANCE POLICY PROVISION TO THE EXTENT NOT COVERED BY THE INDEMNIFICATION AND

HOLD HARMLESS PROVISIONS OF THIS AGREEMENT OR ANY OTHER APPLICABLE INSURANCE POLICY.

4. LESSEE SHALL REMAIN FULLY RESPONSIBLE FOR ALL DAMAGES TO THE SUBJECT AUTOMOBILE, EVEN IF ROAD HAZARD PROTECTION HAS BEEN PURCHASED, WHERE THE DAMAGE OR LOSS OF USE RESULTS FROM:

   (A) INTENTIONAL, WILLFUL, WANTON OR RECKLESS CONDUCT.

   (B) OPERATION OF THE VEHICLE UNDER THE INFLUENCE OF DRUGS OR ALCOHOL IN VIOLATION OF SECTION 1192 VEHICLE AND TRAFFIC LAWS OF THE STATE OF NEW YORK OR OTHER SIMILAR STATE OR LOCAL LAW.

   (C) TOWING OR PUSHING ANYTHING.

   (D) OPERATION OF THE VEHICLE ON AN UNPAVED ROAD IF THE DAMAGE OR LOSS IS A DIRECT RESULT OF THE ROAD OR DRIVING CONDITIONS.

   (E) DAMAGE OR LOSS INCURRED WHILE THE VEHICLE IS USED FOR COMMERCIAL HIRE.

   (F) USED IN CONNECTION WITH CONDUCT IN VIOLATION OF ANY LAW.

   (G) INVOLVED IN A SPEED TEST OR CONTEST OR IN DRIVING TRAINING ACTIVITY.

   (H) OPERATED BY A PERSON OTHER THAN AN AUTHORIZED DRIVER.

   (I) ANY CUSTOMER WHO PROVIDES FRAUDULENT INFORMATION TO THE LESSOR.

(J) THEFT OR LOSS OF THE VEHICLE WHERE THE CUSTOMER HAS FAILED TO REMOVE KEYS FROM THE SUBJECT AUTOMOBILE.

5. The term "vehicle" shall include all tires, tools, accessories and equipment attached thereto and contained therein.

6. Neither Lessee nor any other driver of the vehicle shall be or is deemed to be the agent, employee or servant of Lessor for any reason or for any purpose.

7. Lessee shall return vehicle to Lessor in the same condition as received to the location where rented unless otherwise designated.

8. Lessor, its agents or employees may without demand and without liability to Lessee or other authorized driver repossess the vehicle if it is used in violation of this agreement.

9. Lessee shall fully cooperate with Lessor, its agents or employees in the investigation, defense and/or prosecution of any claim or legal proceeding arising out of the operation or use of the vehicle.

10. Lessor shall not be responsible for loss or damage to any personal property left or carried in or upon vehicle even if the vehicle is repossessed.

11. This vehicle may not be used for: (a) any commercial purposes; (b) in any race, test or competitive event; (c) to propel or tow any vehicle, trailer or other object; (d) by any person who does not possess a valid drivers license or is under the age of 21.

12. Lessor's prior consent is required for any repair to the vehicle.

13. Written authorization must be obtained before leaving the state in which the vehicle was rented. The

vehicle must be returned to the location where it was rented or a mileage charge will be assessed.

14. Without exception this vehicle may not be driven, operated or used in Mexico.

15. No right of Lessor under this agreement may be waived or modified except by a written instrument signed by the Lessor. The terms of this agreement are cumulative and each of them shall apply to every use, operation or driving of the vehicle.

16. Power of Attorney: Lessee hereby grants and appoints to Lessor a limited Power of Attorney to present Insurance claims for property damage to Customer's insurance carrier if the rented vehicle is damaged during the term of the rental agreement; and to endorse Customer's name on insurance payments, either for damage or for rental charges incurred.

17. Delinquent accounts shall bear interest at the highest rate permissible under the laws of the state where this contract was executed.

18. Implied/Express Warranties: Lessor revokes any and all implied or express warranties as to the merchantability or fitness for a particular purpose of the vehicle or any replacement vehicle rented under the terms of this agreement.

19. The terms and conditions of this contract are subject to any pre-existing authorized agreement by and between Lessor and Lessee, Lessor and Lessee's employer, Lessor's agent and Lessee and Lessor and Lessee's agent. Any terms or conditions contained herein which are not subject to any pre-existing authorized agreement remain in full force, in effect.

20. Lessor will assess a charge of $15.00 for each NSF check.

21. This vehicle must be used in conformity with all criminal, civil and motor vehicle laws, rules and or statutes. Failure to use said vehicle in conformity voids all coverages which may be provided, including, but not limited to, liability and property damage protection.

AGENCY RENT-A-CAR, INC.
CLAIMS DIARY

Excerpt – entry of March 19, 1993

* * *

3/19/93	GAVE THE FILE TO CHUCK MORROW FOR REVIEW AND APPROVAL OF THE CATTY'S PROPOSAL. IT LOOKS GOOD TO ME HOWEVER THERE IS NO DOCUMENTATION FROM ANYONE FOR THE INJURIES. I DO KNOW THAT THE ACCIDENT IS OF A VERY SERIOUS NATURE AND THAT THE CASE IS AN OVVIOUS [sic] LIMITS CASE.	S. OCKAJI

* * *

INFORMATION FOR CLAIMS MANUAL

All file notes should be accessed through collision and comp screen.

Diary should be done either through liability screen or collision and comp screen, not both.

If one or the other is closed (PD/Liability/Subro), access diary through the portion of file that is still open.

Diary CANNOT be placed on a closed file.

FILE ORDER AND TABBING

1) *General* – Includes accident report, police report, contract (all 3 parts), indepedent [sic] adjuster's report (not appraiser's report) R/S and R/S summary sheets, liability set-up sheet and blue sheet.

   NOTE: IMPORTANT!!!!
   The reserve sheet and file notes must be on top of this section NO EXCEPTIONS!!!!

2) Correspondence

3) Claimant Specific – Includes meds, index sheet, authority request sheet.

4) IV Property Damage

5) OV Property Damage

6) Subro correspondence

7) Pleadings (Claimant specific)

File Creation

Every insurance company has their own style of setting up a claim file. The following represents Agency's.

The creation of a file begins in the local office. The Office Manager is responsible for asking the renter specific questions concerning the loss by either phone or in person. At that point, he or she then creates a history sheet which begins the tracking of claim activity.

A representative in the local office provides the renter and/or driver of the Agency car with an Accident Report form. The form should be completed, signed, and returned to the Office Manager as soon as possible. Upon receiving the completed form, the Office Manager calls the Claims Office to report the incident, and thereby obtains a claim number. In addition, the appropriate accident code is inputted into the computer, and if necessary, a liability (blue) sheet will be generated.

The completed liability (blue) sheet is then forwarded to the Unit Supervisor for review and evaluation. Upon completion of the assessment, an adjuster is assigned the liability claim work sheet as well as a set-up sheet, outlining specific investigation instructions to be completed. In addition, the Unit Supervisor will establish the initial claim reserves. When the aforementioned information is completed, it will then be entered into the computer Y [sic] the liability support staff along with the adjuster code.

A physical file will be generated the following morning. It is the adjuster's responsibility to match their initial investigation to the physical file.

Attached find a breakdown of the various accident codes as well as a copy of the liability claim (blue) sheet, and liability set-up sheet.

INVESTIGATION & CLAIM GUIDELINES

Each claim file should be evaluated on its merits. The following items are to be used as an outline guide on each file.

The adjuster should contact the claimant and obtain a recorded statement as needed or pre-instructed regarding the special details of the accident as well as document that injuries were not incurred. Should the claimant be injured, determine the degree of injury, the medical treatment received and any anticipted [sic] treatment which may be needed.

The adjuster should determine if there were any passengers in either vehicle. If yes, determine their name, phone number, individual addresses and if any of the passengers exhibited injury.

If the claimant or passenger(s) are injured, complete an index form and obtain a medical wage authorization per injured person. Recorded statements should be taken of any witnesses regarding the facts of the accident and reactions of all parties involved; physical and emotional.

All files should have a copy of the rental agreement unless it is an employee accident.

The adjuster should determine any contributory or comparative negligence on the claimant's part which may mitigate the claim. Were citations issued? If so, determine to whom and for what offense. The adjuster should check for passengers listed on the police report as well as to determine ownership information.

Accident reports should be sent to passengers in the claimant's and rental vehicle in which a recorded statement has been refused.

The claimant should be requested to obtain two estimates and photos of the damage to their vehicle on PD claims under $1500.00. An independent appraiser should be assigned in the following cases:

1. If the damage is over $1500.00

2. If the vehicle is an older model to verify no old damage.

Should the claimant be unable to obtain a picture, they should be referred to one of our shops for a photo and estimate. The amount of damage to the rental vehicle and location of damage should be checked for comparison. Rember [sic] you cannot insist that a claimant go to our shop for repairs, however, try to encourage this when possible.

First call settlements should be attempted whenever possible. If you have any questions, consult your supervisor.

Should there be attorney involvement, acknowledge receipt of the attorney letter in wirting [sic] by utilizing the word processing letter, #44C. Should the claimant advise legal representation by phone, obtain name, address and phone number of attorney and discontinue contact with claimant. Call attorney, request diagnosis, prognosis, index information, medical authorization, etc., as well as representation letter.

If the claimant is unrepresented and the medical bills are under $1000.00, the claim may be settled without the

actual medical bills. It should be understood, however, that copies of the bills are to be forwarded to us with the executed release. Unless the claim can be concluded within the first 30 to 45 days, copies of all medical records should be requested.

Reserving Practices, Bodily Injury Claims

There are few functions more important than maintaining a proper balance between reserves and the actual payments made on claims. Since we have made the decision to have a $500,000.00 S.I.R. and to effectively monitor the impact of Agency's bodily injury claims on its financial structure, the following reserving practices and procedures are being implemented:

1. As in the past, we will continue to establish individual case reserves and reserve for the ultimate probable exposure.

2. Reserves must be set up promptly. In setting the reserve on each bodily injury claim, the individual reviewing the file must make the best possible estimate of what the claim or suit may ultimately settle for.

3. When it comes to setting the reserve, if there is any doubt concerning the liability, injury or damages, such doubt should be resolved in favor of the claimant. Adjustments can always be made to cover subsequent developments.

The following factors should be given consideration when establishing a reserve:

1. Injury

It is important that you learn the true nature of the injury involved. Very often this will necessitate a medical examination if you have some reasonable doubt about the hospital or the plaintiff's medical report.

2. Pain and Suffering

Long and painful disability always increases the value of a claim. This is the item, which in recent years, has been plaguing the insurance companies and which has been the principal reason for some extremely high verdicts.

3. Possible Punitive Damages

Occasionally damages will be permitted in some jurisdictions where there has been wanton disregard for the safety of others. Punitive damages have also been awarded in cases involving accident, health and lift policies where the judge or jury has decided that the insurance company has been capricious in their refusal to pay the claim. Punitive damages have also been awarded against insurance companies and third party claims where a case was not settled within the policy limits for capricious or fraudulent reasons.

4. Age of Claimant

It is obvious that an older person will suffer a greater disability from a certain injury than a younger person. It has been estimated for instance, that every ten years, over the age of 40 increases disability by

10%. Age is also important in a death claim. The deceased's life expectancy is an important factor in establishing monetary loss to his or her dependents.

5. Dependency

This is an item to be considered particularly in death cases. The claimant may leave a dependent spouse, minor children or other dependents.

6. Loss of Salary

This item speaks for itself. It is essential that the amount and the time lost be checked, preferably from payroll records. In cases of long term disability or death, it is important to consider the salary potential of the individual involved as well as the salary he/she was earning at the time of the accident.

7. Medical Expenses

This is one of the items of special damage, along with loss of salary.

8. Economic Status

This item is not one that can be pinned down to a definite amount, like some of those listed heretofore. However, a claim involving a person in the higher income bracket is usually going to cost more than a similar claim sustained by someone whose losses are not so great.

9. Liability or Negligence

Liability is, of course, one of the most important items to be considered in setting the reserve. Whenever a question of fact

requires the determination of a jury, the odds are against the defendant and this must be kept in mind when setting the reserve.

10. Contributory Negligence on the Part of the Claimant

Again, although this is an item for consideration in the overall reserve set up, any doubt should be resolved in favor of the claimant.

11. Other Legal Defenses

Additional legal defenses such as assumption of risk, agency, fellow servant rule, and so forth, might have a bearing on the ultimate outcome of a claim. These are usually of minor concern when it comes to setting a reserve, but sometimes are so outstanding as to deserve a fair amount of the weight in the overall picture.

12. Past Experience of Tendencies of the Local Juries and Courts

It is a known fact that juries in certain areas are more liberal than they are in others. By the same token, certain judges, being only mortal, have their prejudices and predilections. These when known, should also be given consideration in setting the reserve.

13. Realistic Appraisal of the Ability of Your Own Counsel

This item speaks for itself.

14. Knowledge of the Ability of Opposing Counsel

Here again, the item speaks for itself.

15. Coverage

A paramount consideration of course, in every case. An attempt has been made to highlight some of the considerations which enter into the overall reserve picture on each claim. Naturally, all the items do not apply to every claim, and there are some claims which require consideration of items that have not been listed here. Once again, each case deserves separate consideration, and can only be set up by some general guidelines.

16. Fatalities

Although some of the factors involved in a consideration of the reserve figure for a fatal case have already been mentioned, there are others that apply only to this type of claim. Here are some of the items to which consideration should be given:

* * *

MacPherson Law Center
Attorney at Law

Cynthia O. MacPherson
John J. Garrabrant

Legal Assistants
Jason W. MacPherson
Regina L. Peterson

421 East State
P.O. Drawer 680
Mountain Grove, MO 65711
Telephone (417) 926-3138
Fax (417) 926-3140

March 12, 1993

Mr. Steven B. Ockajik
Claims Examiner
AGENCY RENT-A-CAR
30000 Aurora Road
Solon, OH 44139

RE: My Client : Kathleen Quick
D/Accident : 7/6/92
Your Claim No : 249643-161-L27603

Dear Mr. Ockajik:

Please find enclosed a *Petition for Wrongful Death* which we have filed against your insured, Kendrick Carmel Wilhite. In Missouri, Court approval must be obtained for a wrongful death settlement. I have also enclosed a proposed *Petition for Interpleader and Leave to Pay Fund Into Court*. As you can see by this interpleader motion, you would be requesting the Court to allow you to pay your $50,000 to be held by the Clerk of the Circuit Court and further to bring Kenneth Quick, Sondra Quick, Kendra Quick, Jonathan Quick, Lorenzo Brinkley and Patrick Wilhite into the suit as third-party plaintiffs to

determine their respective interest in that fund. If the parties cannot then agree to a disbursement of the $50,000 amongst the parties injured, then the Court will have to determine the appropriate disbursement of the funds. In any event, you will then be protected from any further liability from competing claims to this limited fund.

I do not believe Attorney Edward Murphy, who represents Kenneth Quick and his family, will have any objection to you paying your funds to the Clerk of the Court in this manner and I can assure you that any local attorney appointed as a guardian for Patrick Wilhite will offer no objection to this manner of proceeding. Therefore, either you or your attorney can merely sign these documents and file them with the Court. Once the *Order* bringing in the Additional Party Plaintiffs and approving the payment of the insurance/bond proceeds has been signed, you could then pay your $50,000 to the Clerk of the Wright County Court located in Hartville, Missouri. You would then be free of further involvement except input as to the releases you would want executed to protect your insured and for the court cost which will probably include the Guardian Ad Litem's fee for Patrick Wilhite.

Please give me a call if you have any questions whatsoever. If I am unavailable, Tom Cline is also working

on this case and will be happy to address any concerns or questions that you may have.

Very truly yours,

/s/ Cynthia O. MacPherson
Cynthia O. MacPherson

COM/ps
xc: Edward Murphy
Kathleen Quick
Tom Cline
Enclosures

MACPHERSON LAW CENTER
Attorney at Law

Cynthia O. MacPherson
John J. Garrabrant

Legal Assistants
Jason W. MacPherson
Regina L. Peterson

421 East State
P.O. Drawer 680
Mountain Grove, MO 65711
Telephone (417) 926-3138
Fax (417) 926-3140

April 5, 1993

CERTIFIED MAIL – RETURN RECEIPT REQUESTED

VIA TELECOPY

Mr. Steven D. Ockajik
Claims Examiner
AGENCY RENT-A-CAR
30000 Aurora Road
Solon, OH 44139

RE: My Client : Kathleen Quick
D/Accident : 7/6/92
Your Claim No : 249643-161-L27603

Dear Mr. Ockajik:

This letter is to confirm in writing that our settlement negotiations in the above-captioned claim have been unsuccessfully concluded. On January 7, 1993, at approximately 3:45 PM CST, Attorney Thomas Cline, who along with myself represents Kathleen Quick, specifically offered you an opportunity to protect your insured, Kendrick Wilhite, by giving him *a Release* from personal liability in this matter upon payment of your policy limits of $25,000. Mr. Cline will testify that you orally agreed to

pay in your per accident limits of $50,000 to not protect your insured, but to protect Agency Rent-A-Car from multiple exposure from competing claims as well. We rightfully assumed the case was settled as to Mrs. Quick's claim for the wrongful death of her daughter Anne.

On March 12, 1993, having been informed by Mr. Cline that the case was settled, I mailed you the necessary paperwork to conclude this settlement. When I did not hear from you after two and one-half weeks, I called on March 30, 1993, to see when we could expect the papers filed and the insurance funds impleaded. I was quite *shocked* when you informed me the case was not settled because we had not yet sent you any *"specials"*. Your rejection of our settlement offer on this ground was beyond belief. It is *your* duty and obligation to investigate the merits and determine the value of a claim in order to protect your insured. Your failure to do so, when given the opportunity, coupled with your further failure to settle within the policy limits on a claim having a worth far in excess of your coverage, is classic bad faith.

It has been over nine months since Anne's death; almost four months since you agreed to settle this claim. Your subsequent rejection of our offer to settle for the $25,000 policy limits and to give your insured a release protecting him from personal liability is outrageous misconduct and will be sufficient to expose Agency Rent-A-Car to an award of punitive damages.

The week after Anne's death, you were informed of our demand for your policy limits of $25,000. You were also informed at the outset of our demand that a $6,500,000 award for the death of an emancipated twenty-

two year old, from whom her wealthy parents expected no future support, was held not to be excessive under Missouri's wrongful death laws. Despite this, for nine months, you have been guilty of nonfeasance and delay. your current position that you don't know what, *if anything*, you owe on this claim, unconscionably exposes your insured to catastrophic personal liability. Agency Rent-A-Car's obvious bad faith toward its insured as well as my client will leave you responsible for the entire *Judgment*.

You have rejected our offer to settle within the limits of your policy; this offer will never again be re-extended to you. You have placed your insured, who has a pro-football career ahead of him, at risk for a large personal *Judgment*, a personal *Judgment* from which you could have protected him had you acted in good faith. It is now our position that you, and not your insured, will be responsible for the *Judgment* we will obtain including those amounts in excess of your coverage.

Very truly yours,

/s/ Cynthia O. MacPherson
Cynthia O. MacPherson

COM/ps
xc: Tom Cline
Kathleen Quick

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Consolidated Nos. 94-3989 and 95-1045

KATHLEEN QUICK, an individual
assignee of Kendrick Wilhite

Plaintiff-Appellee

v.

AGENCY RENT-A-CAR, INC. n/k/a
NATIONAL AUTO CREDIT, INC.

Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE WESTERN DISTRICT OF MISSOURI
SOUTHERN DIVISION

PETITION AND SUGGESTION
FOR REHEARING EN BANC

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IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

KATHLEEN QUICK, an individual, assignee of Kendrick Wilhite,	)	
Plaintiff-Appellee,	)	Case Nos.
	)	94-3989
vs.	)	95-1045
NATIONAL AUTO CREDIT, f/k/a AGENCY RENT-A-CAR, INC., a Delaware Corporation,	)	
Defendant-Appellant.	)	

PETITION AND SUGGESTION FOR REHEARING EN BANC

Kathleen Quick, Appellee requests a rehearing en banc to consider the decision, issued in this case because: (I) The Opinion examines issues not briefed by the parties or preserved for appellate review, ignores the jury's factual determinations and admissions of Agency in violation of the Seventh Amendment to the United States Constitution; (II) The Opinion equates a bad faith claim with a claim for personal injury and erroneously determines that a claim for bad faith is not assignable; and (III) the Opinion fails to follow Eighth Circuit and Missouri rulings on the measure of damages in a breach of contract case, and interprets Missouri law in such a manner that imposes disparate treatment of persons damaged by a breach of contract thereby denying equal protection in the application of state law, in violation of the Fourteenth Amendment to the United States Constitution.

Point I

The Opinion Exceeds The Scope Of Review By Reexamining The Jury's Factual determination And Agency's Judicial Admission That A Fiduciary Duty Was Owed To Wilhite, An Issue Which was Not Briefed Or Preserved For Appellate Review

During trial, Agency admitted it owed a fiduciary duty to Wilhite. Agency's Vice President and head of claims, Dennis Ulrich testified that Agency reserved in its rental contract the right to handle the defense of a renter as well as the right to determine when and if any sum of money would be paid in settlement of any suit or claim.

Testimony of Ulrich (Tr. p. 270, L. 8-19):

Q. Now, Mr. Ulrich, you recognize that your company, like some auto liability insurance companies, reserves in its rental contracts the right to handle the defense of a renter if your liability protection is available to protect the renter; isn't that correct?

A. Yes.

Q. And your company also reserves in its rental contract the right to determine when and if any money is going to be paid in settlement of any suit or claim that's pending?

A. Yes. We have to – if there's a conflict, we have to provide separate defense counsel for the renter, as well as counsel for the company.

Mr. Ulrich explicitly admitted the existence of a fiduciary duty contrary to this Court's determination that a fiduciary duty did not exist. The testimony of Mr. Ulrich at Tr. p. 272, L. 3-8, is as follows:

Q. And you do that because you recognize that your company, just like other insurance companies do, that they've got a fiduciary duty to that for their renters?

A. Yes.

Q. It's a duty of trust you owe to them; isn't that right?

A. That's correct.

Agency's judicial admission estops it from asserting before this Court the lack of a fiduciary duty owed Wilhite. In ***Monterey Development v. Lawyer's Title Ins.,*** 4 F.3d 605 (8th Cir. 1993), the Court recognized that judicial estoppel is designed to preserve the dignity of the Courts and insure order in judicial proceedings. See also ***Jockel v. Robinson,*** 484 S.W.2d 227, 231 (Mo. 1972) and ***Beck v. Edison Bros.,*** 657 S.W.2d 326, 329 (Mo.App. 1983) which deal with the binding effect of judicial admissions.

The Opinion's determination that a fiduciary duty did not exist in the face of the clear terms of the rental contract, the admissions of defendant and the facts logically determined by the verdict of the jury, contradicts a long line of decisions of this Court and the Seventh Amendment to the United States Constitution which prohibits a reexamination of issues determined by a jury. The Court in its opinion has exceeded the scope of review as established by the parties during post-trial proceedings. ***Kelley v. Crunk,*** 713 F.2d 426 (8th Cir. 1983); ***Green v. American Airlines, Inc.,*** 804 F.2d 453 (8th Cir. 1986); ***Czajka v. Black,*** 901 F.2d 1484 (8th Cir. 1990). In ***Kelley v. Crunk,*** the Court reiterated the established rule on the scope of the appellate review and stated:

> *It is well settled that issues not raised in the trial court cannot be considered by this court as a basis for reversal.*

The Opinion exceeds the scope of appellate review by examining the issue not disputed at trial or asserted as a basis for appeal. A review of Agency's points presented in their appellant's brief and the twenty-nine pages of argument show that the issue of Agency's fiduciary duty was never appealed. The Seventh Amendment to the United States Constitution prohibits the reexamination of facts tried by a jury other than according to the rules of common law.

In ***Czajka v. Black***, 901 F.2d 1484 (8th Cir. 1990) this Court in considering a motion for a new trial based on the weight of the evidence, stated at page 1485:

> *Appellants have made no effort to address our concerns, expressed in* ***Green v. American Airlines*** *. . . as to whether, in light of the Seventh Amendment, we have the power to reverse a district court's decision to deny a motion for a new trial based on weight of the evidence grounds.*
>
> . . . .
>
> *As we observed in* ***Green,*** *the abuse of discretion standard has been applied in our circuits only to orders granting new trials.*

In accord, see ***Lee v. Rapid City Area District No. 51-4***, 981 F.2d 316 (8th Cir. 1992).

The Opinion concludes on page 9 that Agency lacked the "total control over the settlement proceeds which would be necessary to impose upon Agency the duty to settle in good faith". The issue is not "total control over

settlement" but exclusive control of the money to be paid for settlement of claims. In order to obtain the benefit of the liability protection provided by his contract with Agency, Wilhite was prevented from negotiating a settlement of the underlying wrongful death claim.

Judge McMillian pointed out in his concurring opinion that:

> *The rental contract does, however, provide that its indemnification and hold harmless agreement 'shall not apply . . . to any obligation assumed by the Customer or driver under any contract of whatever nature,' a condition which arguably would penalize the customer, or the customer's insurer, from negotiating a settlement, without the approval of Agency." (at page 12).*

The facts judicially admitted by Agency establish Agency exercised the same level of control over their settlements as other insurors. The contract language and the testimony of Agency's claims supervisor, Mr. Ockajik, (Tr. pp. 186, 212, 215-216) clearly substantiated the control.

Tr. p. 186, L. 10-18:

Q. Okay. Well, you understood – you understand that your rental contract reserves to your company, Agency Rent-A-Car, the right to defend and hire a lawyer for the renter, if necessary?

A. Yes, I do.

Q. And you understand your company reserved the right to determine when and if it was appropriate to settle any claim or lawsuit against your renter?

A. Yes.

Tr. p. 212, L. 9-13

Q. You knew that the only liability protection available for him and the only company out there that had the right, and indeed the duty, to hire a lawyer to defend him was your company, Agency Rent-A-Car?

A. yes.

Tr. p. 215, L. 16-25

Q. And the obligation to consider demands or offers to settle within the policy limits to protect your renter are the same as the obligations to protect an insured under a regular auto liability policy; isn't that right, sir?

A. We have the obligation to protect the renter, yes.

Q. You have the same obligation to consider settlements that are demanded or offered within the limits of your coverage; isn't that correct?

A. Yes, we do.

Q. You reserved to yourself –

Tr. p. 216, L. 1-6

As you've indicated, your company reserves to itself the right to determine when and if to settle and for what amount?

A. That's correct.

Q. And you don't leave that up to the renter?

A. No, we don't.

Testimony of Agency's in-house counsel, Yormick, (Tr. pp. 265-266) Tr. p. 265, L. 25 and p. 266, L. 1-10:

Q. Mr. Yormick, isn't it true that Agency Rent-A-Car owed him protection? They owed him liability protection and a defense and a duty to consider settlement offers or demands within the limits of coverage available; isn't that true, sir?

A. Yes, I think that's been established, and I would agree with that.

Q. And isn't it true that by reason of the lack of a defense being provided on his part, he has a judgment against him for six and a half million dollars today?

A. That's true.

These facts presented to the Jury establish that Agency did possess the type of "control" over settlement which the Opinion determines did not exist. Further, Agency, as a self-insuror, was required to perform in the handling of claims as if it had issued a liability insurance policy. Section 303.190 R.S.Mo. sets forth certain obligations which are deemed, as a matter of law, included in all liability policies and provides in part:

> *"6. Every motor vehicle liability policy shall be subject to the following provisions which need* ***not be contained therein:***
>
> *. . . (3) the insurance carrier* ***shall have the right*** *to settle* ***any claim*** *covered by the policy, and if such settlement is made in good faith, the amount thereof shall be deductible from the limits of liability specified in subdivision (2) of sub-section 2 of this section;" (Emphasis added).*

Judge McMillian's concurring opinion sets forth the proper legal analysis of the issues pertaining to control over the settlement process. Agency judicially admitted that it endeavored to exercise control over the settlement process and that it owed a fiduciary duty.

Point II

The Determination Made By The Court That A Claim For Bad Faith Is Not Assignable In the State Of Missouri Is Contrary To Existing Law

The Opinion cited a number of cases which hold a claim for personal injuries is not assignable. (Opinion pp. 9-10) Without explanation, the Court concluded Wilhite's claim of bad faith was not assignable.

The Opinion of the Court overlooks the fact that Wilhite did not at any time endeavor to assign a claim for "personal injury". What he did assign were claims arising out of and relating to a "breach of contract" which he entered into with Agency. Kathleen Quick received an assignment from Wilhite for the right to assert a claim for remedies available by reason of the breach of a contractual relationship which Wilhite entered into with Agency, a claim which also sounded in tort.

The Opinion notes that ***Ganaway v. Shelter Mutual Ins. Co.***, 795 S.W.2d 554 (Mo.App. 1990) allows the assignment of bad faith claims ***either*** by the insured or by a bankruptcy trustee. (Opinion p 10). The Opinion effectively overlooks Missouri law allowing the assignment by an insured of a bad faith claim. If the Opinion were correct in its application of the law, any party in Wilhite's shoes would have to seek bankruptcy relief or be forced

into bankruptcy to obtain the benefit of assigning his bad faith claim to his judgment creditor.

Missouri Supreme Court decisions on the assignability of certain claims show that the only claims which are not assignable are those for personal injury, personal service, marriage contracts and the like. ***State ex rel Park National Bank v. Globe Indemnity Co.***, 61 S.W.2d 773 (Mo. 1993). Claims for fraud are assignable in Missouri. ***Houston v. Wilhite***, 27 S.W.2d 772 (Mo.App. 1930), including the right to assert a claim for punitive damages incident to the actual damages sustained by reason of the fraud. ***State ex rel. Smith v. Green,*** 494 S.W.2d 55 (Mo. 1973) and ***Eastern Atlantic Transportation v. Dingman,*** 727 S.W.2d 418 (Mo.App. 1987).

Point III

Jury Award of Actual Damages Reduced By The Court

The Opinion finds that Agency breached its contract to Wilhite by failing to defend him in the underlying suit for the wrongful death of Kathleen Quick's eleven year old daughter. (Opinion p. 5). The Opinion also notes that the jury awarded actual damages of $6.5 million. (Opinion p. 4). The jury verdict for actual damages was based upon a certified copy of a Judgment rendered against Wilhite in the underlying suit that Agency failed to defend.

The Opinion determines that $25,000 is the appropriate measure of damages, with the exception of Judge McMillian, who stated in his concurring Opinion:

> *" . . . I think a self insurer should be required to pay both liability claims and any claims related to its mishandling of those liability claims to the same extent as would a third party insurer." (Opinion p. 15).*

Missouri has, as most other jurisdictions, adopted the principles of contract damages as set out in the early English case of ***Hadley v. Baxendale,*** 9 Exch. 341, 26 Eng. L. & Eq 398 (1854). [See ***Liberty Financial Management v. Beneficial Data,*** *670 S.W.2d 40, 57 (Mo.App. 1984;* ***W. C. Hardesty Co., Inc. v. Schaefer,*** *139 S.W.2d 1031, 1035 (Mo.App. 1940)].*

Missouri Courts have clarified this long established rule by stating:

> *Under the contract claim the injured party can recover actual damages for the direct and natural consequences of the breach* ***or*** *for damages that were within the contemplation of the contracting parties." (emphasis added).* ***Ross v. Holton,*** *640 S.W.2d 166, 173 (Mo.App. 1982).*

Until now, this Court has been in accord with these principles as shown in ***United Industrial Syndicate, Inc. v. Western Auto Supply Company,*** 686 F.2d 1312 (8th Cir. 1982), where the court stated:

> *The fundamental measure of contract damages is that which places the non-breaching party in the position it would have been but for the breach.*

See also ***Boten v. Brecklein,*** 452 S.W.2d 86 (Mo.App. 1990).

Missouri Courts have not hesitated to apply this measure of damages in cases where an insurer has failed

to defend the insured. In ***Landie v. Century Indemnity Company,*** 390 S.W.2d 558, 562 (Mo.App. 1965) the Court states:

> *Thus the universal rule which Missouri follows is that an insurance company is liable to the limits of its policy plus attorney fees, expenses* ***and other damages*** *where it refuses to defend an insured who is in fact covered. (Emphasis added).*

The Court in ***Landie*** *further stated:*

> *This general rule is concisely set out in the annotation at 49 ALR2d 694, 1.c.711 where it is said: 'Thus, all the cases agree that where it is the insuror's duty to defend, and the insuror wrongfully refuses to do so on the ground that the claim upon which the action against the insured is based is not within the coverage of the policy, the insuror is guilty of a breach of contract which renders it liable to the insured for all damages resulting to him as a result of such breach'.*

The Eighth Circuit has interpreted and applied ***Landie*** in ***Luke v. American Family Mutual Insurance Company,*** 476 F.2d 1015, 1021 (1973). In ***Luke,*** the Court sitting en banc, held that an insuror who both refused to settle a claim for policy limits in a wrongful death case and refused to defend its insured, was responsible for all the damages resulting and specifically stated, at page 1022, the following:

> *We find the entire judgment was the natural consequence and proximate result of the defendant's breach of its obligation to defend its assured.*

In ***Fuller v. Lloyd,*** 714 S.W.2d 698 (Mo.App. 1986), suit was brought by the insured against USF&G for the

failure to defend an underlying suit. Judgment was entered against USF&G for $10,000.00 which represented consequential damages for the loss of the insured's driver's license, along with a judgment for indemnification from an underlying judgment in the amount of $25,000 previously obtained against Lloyd, the insured of USF&G. The Court specifically noted in assessing consequential damages that:

> *When an insurance company refuses to defend an insured, the company becomes liable for damages which flow from the refusal to defend. (At page 702).*

Judge McMillian recognized this basic rule of consequential damages in ***Carpenter v. Automobile Club Interinsurance Exchange***, 58 F.3d 1296 (8th Cir. 1995) where he stated at page 1302 that the insured:

> *. . . cannot be made whole unless she is given the opportunity to recover the entire amount of the judgments obtained against her in the underlying state court action . . .*

In light of the testimony of Agency's adjuster, its Vice President and head of claims, (p. 2 of this petition) and its in-house attorney, it is clear that the underlying judgment against Wilhite was the direct consequence of Agency's failure to defend him.

Testimony of Ockajik. (Tr. p. 220, L. 15-22):

Q. Isn't it true, Mr. Ockajik, that Agency Rent-A-Car did not protect Mr. Wilhite?

A. Yes.

Q. And isn't it true, Mr. Ockajik, that if Agency Rent-A-Car would have just hired a lawyer for Mr. Wilhite, there wouldn't be a six and a half million dollar judgment against him that he couldn't possibly pay today?

A. Yes.

The testimony of in-house counsel, Yormick. (Tr. pp. 265, L. 25 and 266, L. 1-10.)

Q. Mr. Yormick, isn't it true that Agency Rent-A-Car owed him protection? They owed him liability protection and a defense and a duty to consider settlement offers or demands within the limits of coverage available; isn't that true, sir?

A. Yes, I think that's been established, and I would agree with that.

Q. And isn't it true that by reason of the lack of a defense being provided on his part, he has a judgment against him for six and a half million dollars today?

A. That's true.

The Opinion of the Court leaves Wilhite exposed to a debt in excess of $7 million and is contrary to the law of consequential damages. The Opinion conflicts with this Court's prior determinations which hold that evidence supporting an issue, determined by a jury, must be considered in a light most favorable to the non-movant. All conflicts in the evidence must be resolved in favor of the non-movant and the Court is required to assume as proved all facts that the non-movant's evidence tended to prove, giving the benefit of all reasonable inferences that

may reasonably be drawn from the facts proved. ***Nelson v. Boatmen's Bancshares, Inc.,*** 26 F.3d 796 (8th Cir. 1994).

In this case, the evidence presented to the jury substantiated that Agency was forewarned a judgment for the exact amount rendered against Wilhite was possible. The possibility of the judgment amount was shown by the testimony relative to the oral communications had with agency in July 1992 (Tr. p. 44-45) and again on March 30, 1993 (Tr. pp. 55-57) then in writing on April 5, 1993. (Tr. pp. 60-62 and Plaintiff's trial Ex. 5, K. Quick, App. p. A37A40.) Agency was clearly warned that the claim against Wilhite might be worth $6.5 million.

As indicated by the Court in its footnote at page 2 of its Opinion, the evidence presented at trial substantiated that Agency was given an opportunity, prior to the time the default judgment was entered, to obtain a release of liability for Wilhite in exchange for its agreement to pay the sum of $25,000. Aside from the testimony, these facts were born out by documentary evidence in the form of written communications submitted to Agency under dates of March 12, 1993 and April 5, 1993 (Tr. pp. 52-53, 104; Plaintiff's trial Ex. 3, K. Quick App. p. A27-A28 and Tr. pp. 60-62, Plaintiff's trial Ex. 5, K. Quick App. p. A37-A40). The judgment for $6.5 million was rendered against Wilhite on April 27, 1993. Agency had been warned three times (twice orally and once in writing) that the extent of Wilhite's exposure might well be in the amount of $6.5 million. No claim can now be made that Agency was not apprised of the potential damage to Wilhite in the event of its non-performance. It is the damage due to Agency's non-performance which Wilhite was entitled to recover as

actual damages and which in fact the jury assessed by its verdict after hearing all of the evidence in the case.

By reducing the actual damages to $25,000 from the verdict of $6.5 million, the Opinion collides with the prohibitions imposed by the Seventh Amendment to the United States Constitution and this Court's holdings in ***Kelley v. Crunk***, 713 F.2d 426 (8th Cir. 1983); ***Green v. American Airlines, Inc.***, 804 F.2d 453 (8th Cir. 1986); ***Czajka v. Black***, 901 F.2d 1484 (8th Cir. 1990); and ***Latham Seed v. Nickerson American Plant Breeders***, 978 F.2d 1493 (8th Cir. 1992).

The Opinion determines that Wilhite, and Kathleen Quick as the assignee of Wilhite's claims against Agency, must be treated differently from all others who sustain damages from a breach of contract, thus denying them equal protection of the law in violation of the Fourteenth Amendment to the United States Constitution.

The effects of the Opinion serve to limit the exposure of any liability insurance carrier to the policy limits for a breach of duty to defend its insured. The chilling effects of this ruling provide no incentive for an insurer to provide a defense of a claim which has a value which is obviously in excess of the policy limits.

Required Statement Of Counsel

In compliance with Rule 35A of the United States Court of Appeals for the Eighth Circuit, counsel for Kathleen Quick states: I express a belief, based on a reasoned and studied professional judgment, that the decision is contrary to the Seventh Amendment to the

United States Constitution and the following decisions of the United States Court of Appeals for the Eighth Circuit, and that consideration by the full Court is necessary to secure and maintain uniformity of decisions in this Court:

> Seventh Amendment to the United States Constitution; ***Kelley v. Crunk,*** 713 F.2d 426 (8th Cir. 1983); ***Green v. American Airlines, Inc.,*** 804 F.2d 453 (8th Cir. 1986); ***Czajka v. Black,*** 901 F.2d 1484 (8th Cir. 1990); ***Latham Seed v. Nickerson American Plant Breeders,*** 978 F.2d 1493 (8th Cir. 1992); ***United Industrial Syndicate, Inc. v. Western Auto Supply Co.,*** 686 F.2d 1312 (8th Cir. 1982). ***Luke v. American Family Mutual Insurance Company,*** 476 F.2d 1015 (8th Cir. 1973); ***Carpenter v. Automobile Club Interinsurance Exchange,*** 58 F.3d 1296 (8th Cir. 1995).

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This is to certify that on September 25, 1995, twenty-one copies of the foregoing PETITION AND SUGGESTION FOR REHEARING EN BANC were served upon the

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VIA:

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Thomas W. Millington

No. 95-1016

Supreme Court, U.S.
FILED
JAN 25 1996
CLERK

In The

Supreme Court of the United States

October Term, 1995

KATHLEEN QUICK,

Petitioner,

vs.

NATIONAL AUTO CREDIT, INC. f/k/a AGENCY RENT-A-CAR, INC.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Did the Eighth Circuit correctly reverse the judgment in favor of the petitioner on her state-law tort claim for bad faith refusal to settle when the Eighth Circuit determined that the petitioner had no such claim as a matter of Missouri law?

2. Did the Eighth Circuit correctly determine that the petitioner's tort claim for bad faith refusal to settle did not lie under Missouri law because Missouri law did not impose on the defendant car rental company a fiduciary duty to settle a claim against a renter when the defendant had not reserved to itself in its car rental contract the exclusive right to accept an offer to compromise a claim and settle all claims?

3. Did the Eighth Circuit correctly conclude that the petitioner, as the purported assignee of the renter's state-law tort claim for bad faith refusal to settle, had no such claim because such a claim is not assignable as a matter of Missouri law?

4. Did the Eighth Circuit correctly reverse the district court's award of tort-based damages (including punitive damages), and correctly direct the district court to enter judgment only for the amount of contract damages allowable under Missouri law, when the Eighth Circuit reversed the judgment below on the petitioner's tort claim and affirmed only on the petitioner's breach of contract claim?

STATEMENT PURSUANT TO RULE 29.6

Respondent National Auto Credit, Inc., formerly known as Agency Rent-A-Car, Inc., has no parent corporation and no non-wholly-owned subsidiaries.

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CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED

No constitutional provision is involved. This is a diversity case involving only issues of Missouri law.

The Eighth Circuit's direction of the entry of the appropriate judgment was authorized by 28 U.S.C.§ 2106, which reads as follows:

> The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

STATEMENT OF THE CASE

Petitioner's tortured reading of the Eighth Circuit's opinion grossly mischaracterizes what the appellate court held in an effort to manufacture constitutional issues where none exist. A fair reading of that opinion (reported at 65 F.3d 741) shows that the Eighth Circuit did not reverse any finding of fact implied by the jury verdict or substitute its own, and did not deprive petitioner of due process or equal protection. The court merely held that petitioner had no bad faith tort claim as a matter of Missouri law. Likewise, the appellate court's reduction of the damage award to the amount of contract damages allowable under Missouri law on the petitioner's breach of contract claim, on which judgment was affirmed, was not "without explanation" but was soundly based on the

reversal of the judgment on the petitioner's tort claim. (Pet. App. 5, 8-13.)

In the decision below, the Eighth Circuit analyzed Missouri law and Agency's car rental contract and held that the trial court erred, as a matter of law, in failing to grant Agency's motions for judgment as a matter of law on the petitioner's alleged tort claim for bad faith refusal to settle, on two different legal grounds. (*Id.*). First, the appellate court determined, as a matter of law, that Agency's car rental contract did not reserve to Agency the *exclusive* right to settle claims against its renter, and therefore that under Missouri law, Agency did not have a fiduciary duty to settle such claims. Accordingly, the court held that the petitioner had no bad faith tort claim, as a matter of Missouri law, because Agency could not have breached a duty which it did not have. (Pet. App. 8-11; *see also* Pet. App. 38-39.)

Second, the Eighth Circuit held that the petitioner, as the purported assignee of the renter's alleged tort claim for bad faith refusal to settle, had no such claim on which to sue, as a matter of law, because the renter's alleged tort claim for bad faith refusal to settle was not assignable to the petitioner under Missouri law. (Pet. App. 11-12.) Therefore, Agency was entitled to judgment as a matter of law on the petitioner's alleged bad faith tort claim on both grounds. (Pet. App. 12.)

Because the Eighth Circuit determined that the judgment below included tort damages (including punitive damages), and the petitioner had no tort claim under Missouri law, the appellate court consequently reversed the damage award as well. (Pet. App. 5, and n.3, 7, 13.) But since the appellate court affirmed the judgment for the petitioner on her breach of contract claim (Pet. App. 6-7), the court directed the district court to enter judgment for the amount of contract damages

allowable under Missouri law based on Agency's contractual limit of liability. (Pet. App. 7, 13.)

Additionally, petitioner asserts incorrectly that Agency did not complain of the district court's errors in the district court or on appeal. (Pet. 8-9, 16.) In fact, Agency moved for judgment as a matter of law at the close of the petitioner's evidence, and at the close of all evidence, on the same grounds on which the Eighth Circuit reversed (except assignability). (Resp. App. 1a-8a; *see* Pet. App. 5.) Agency again raised these grounds in its motion for a new trial or for judgment as a matter of law. (Resp. App. 9a-10a; *see* Pet. App. 5.) Finally, Agency raised all of the grounds on which the Eighth Circuit reversed in its briefs in that court. (Resp. App. 11a-44a.))

REASONS FOR DENYING WRIT

I.

THIS CASE PRESENTS NO CONSTITUTIONAL QUESTION BUT ONLY QUESTIONS OF MISSOURI LAW.

Petitioner has bent, twisted, and warped the decision of the appellate court in an effort to force it into a constitutional mold. The simple truth, however, is that neither the Seventh Amendment right to a jury trial nor the Fourteenth (actually Fifth) Amendment right due process or equal protection is implicated here at all. The cases cited by the petitioner to support her constitutional arguments (Pet. 9-10, 14, 15, 17) are not on point.

A. The Seventh Amendment Right To A Jury Trial Is Not Implicated Because The Eighth Circuit Reversed On Questions Of Missouri Law, Not On Issues Of Fact.

In reversing the judgment below on the bad faith tort claim, the Eighth Circuit did not reverse any implied finding of fact by the jury, or substitute any factual finding of its own. On the contrary, the appellate court, after analyzing Missouri law and the car rental contract involved in this case (Pet. App. 9-11), concluded that the alleged bad faith tort claim simply did not lie and was not assignable as a matter of law. (Pet. App. 11.)

These determinations were legal determinations based upon Missouri law and the language of the particular contract involved. (Pet. App. 9-11.) No finding of fact implied by the jury verdict was reversed, and no finding of fact of its own was substituted by the Eighth Circuit. Consequently, the Seventh Amendment right to a jury trial is not implicated at all. *Neely v. Martin K. Eby Constr. Co.*, 386 U.S. 317, 322, *reh'g denied*, 386 U.S. 1027 (1967) (appellate court's grant of judgment *n. o.v.*, after reversing trial court's denial of judgment *n. o. v.*, does not violate Seventh Amendment right to jury trial). *See Galloway v. United States*, 319 U.S. 372, 388-93, 396, *reh'g denied*, 320 U.S. 214 (1943) (directed verdict does not violate Seventh Amendment); *Hepner v. United States*, 213 U.S. 103, 115 (1908) (same); *Fidelity & Deposit Co. v. United States*, 187 U.S. 315, 319-21 (1902) (summary judgment does not violate Seventh Amendment); *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 335-37 (1979) (application of collateral estoppel does not violate Seventh Amendment); *Ex parte Peterson*, 253 U.S. 300, 310 (1920) (no right to jury trial where no issues of fact to be determined).

Nor is the Seventh Amendment right to a jury trial implicated by the Eighth Circuit's reversal of the damage

award and its instructions to enter judgment in a specified amount. The judgment below was based on both the bad faith tort claim and a breach of contract claim, and included both contract and tort damages, including punitive damages. (Pet. App. 4-5 & n.3.) As a result of the reversal of the judgment based on the petitioner's bad faith tort claim, the Eighth Circuit correctly reversed the damage award insofar as it included tort-based damages, and instructed the district court to enter judgment in the amount of contract damages allowable under Missouri law on the breach of contract claim for failure to defend (see discussion below at p. 10), the judgment on which claim alone was affirmed. (Pet. App. 5, n. 3, 6-7, 13.) 28 U.S.C. § 2106; *Insurance Co. v. Piaggio*, 83 U.S. 378, 386-388 (1873); *Davis v. Omitowoju*, 883 F.2d 1155, 1159-65 (3d Cir. 1989); *Boyd v. Bulala*, 877 F.2d 1191, 1196 (4th Cir. 1989); *Garrett v. Faust*, 183 F.2d 625, 629 (3d Cir. 1950), *cert. denied*, 340 U.S. 931, *reh'g denied*, 341 U.S. 917, 933 (1951).

Because the amount of damages to be awarded on the breach of contract claim was limited under Missouri law to the contractual limit of liability (*id.*) and that amount was undisputed (Pet. App. 4-5), the correct amount of damages on the breach of contract claim was simply a question of the application of law to fact by the court, and not a question of fact for the jury. *Insurance Co.*, 83 U.S. at 386-88; *Davis*, 883 F.2d at 1159-65; *Boyd*, 877 F.2d at 1196; *Garrett*, 183 F.2d at 629. Again, the Seventh Amendment right to a jury trial was not implicated.

B. The Fifth Amendment Right To Due Process And Equal Protection Are Not Implicated.

Although the petitioner purports to rely on the Fourteenth Amendment due process and equal protection clauses, it is plain from its terms and well-established case law that the

Fourteenth Amendment applies only to the states, and not to the federal government. U.S. Const. Amend. XIV, § 1; *District of Columbia v. Carter*, 409 U.S. 418, 423-24, *reh'g denied*, 410 U.S. 959 (1973); *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954). Since the action about which the petitioner complains was taken by a federal court, it is actually the Fifth Amendment due process clause which would be applicable if any due process or equal protection right were implicated. U.S. Const. Amend. V; *see District of Columbia*, 409 U.S. at 424; *Buckley v. Valeo*, 424 U.S. 1, 93 (1976); *Bolling*, 347 U.S. at 499; *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243, 249 (1833). None is, however. Indeed, the petitioner did not raise a due process claim in the Eighth Circuit (*see* Pet. App. 60-76) although she attempts to do so now. (Pet. 14, 15-16.)

1. The Eighth Circuit's Judicial Determination That Petitioner's Purported Bad Faith Tort Claim Did Not Exist As A Matter Of Law Accorded Petitioner Full Due Process And Did Not Deprive Her Of A Property Interest.

The Eighth Circuit's legal determination that a tort claim for bad faith refusal to settle did not exist as a matter of Missouri law did not deprive the petitioner of any property right without due process of law for two reasons. First, the petitioner does not have any "property interest" in a purported legal claim which does not exist as a matter of state law. *Board of Regents v. Roth*, 408 U.S. 564, 569-70, 577 (1972) (mere unilateral expectation is not a property interest protected by due process; property interests are created and defined by existing rules or understandings from a source, such as state law, that secure certain benefits and support claims of entitlement to them); *see Martinez v. California*, 444 U.S. 277, 282 and n. 5, *reh'g denied*, 445 U.S. 920 (1980); *Ferri v. Ackerman*, 444 U.S. 193, 198 (1979).

Second, the petitioner was accorded full due process in the Eighth Circuit, and has pointed to no element of due process—notice, a hearing, an unbiased decision-maker—that was denied her by the appellate court. *See generally, Dixon v. Love*, 431 U.S. 105, 113-14 (1977). The petitioner's real complaint is that the appellate court rejected her legal arguments; but that is not a denial of due process. *See generally, Sun Oil Co. v. Wortman*, 486 U.S. 717, 730-32 (1988) (even erroneous construction of state law by court does not deny due process); *Union Pacific R.R. Co. v. Sheehan*, 439 U.S. 89, 91-92 (1978) (no denial of due process where petitioner's arguments were considered).

2. The Eighth Circuit's Limitation Of Petitioner's Damages On Her Contract Claim For Failure To Defend To Those Allowable By Missouri Law Did Not Deny Her Equal Protection.

Nor is the Eighth Circuit's instruction to the district court to enter judgment in the amount of contract damages allowable under Missouri law on the petitioner's contract claim for failure to defend, the judgment on which claim alone was affirmed, a denial of equal protection. The measure of damages on a contract claim for failure to defend is prescribed by Missouri law. See below p. 10. The appellate court's holding that the petitioner was limited to that measure of damages on her contract claim did not deny her equal protection. *See Duke Power Co. v. Carolina Envtl. Study Group*, 438 U.S. 59, 82-88 and n. 32, *reh'g denied*, 439 U.S. 884 (1978) (sustaining limitations on compensatory damages for tort claims in certain circumstances); *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618 (1978) (upholding limitation of damages for wrongful death on high seas to pecuniary damages and therefore eliminating loss of society damages). Indeed, another appellate court has described a similar equal

protection argument as "puerile." *DCPB, Inc. v. City of Lebanon*, 957 F.2d 913, 916, n. 3 (1st Cir. 1992).

Accordingly, this case presents no issue of constitutional law to be decided by the Court. It presents only matters of Missouri law which were correctly decided by the appellate court.

II.

THE EIGHTH CIRCUIT CORRECTLY DECIDED THIS CASE UNDER THE APPLICABLE MISSOURI LAW, SO THERE IS NO NEED FOR THIS COURT TO EXERCISE ITS SUPERVISORY POWERS OVER THE APPELLATE COURT.

Under Missouri law, a tort action for bad faith failure to settle a claim requires a particular balance of power between the parties to a contract: only when one party assumes *exclusive* control of the right to settle claims does that party have the duty to exercise good faith in considering offers to compromise a claim. *Ganaway v. Shelter Mut. Ins. Co.*, 795 S.W. 2d 554, 556 (Mo. App. 1990). As a result, a tort claim for bad faith refusal to settle does not lie unless the defendant reserved to itself the *exclusive* right to accept an offer to compromise a claim and to settle a dispute. *Id.* at 557; *Zumwalt v. Utilities Ins. Co.*, 228 S.W. 2d 750, 753 (Mo. 1950). The Eighth Circuit correctly so held, citing *Ganaway* and *Zumwalt*. (Pet. App. 9.)

The Eighth Circuit compared the language of the *insurance contract* in *Ganaway* to the *car rental contract* involved in this case and determined, as a matter of law, that Agency had *not* reserved to itself the *exclusive* right to settle in this case. (Pet. App. 9-11.) As a result, the court concluded, as

a matter of law, that "Agency lack[ed] the total control over the settlement process which would be necessary to impose upon Agency the duty to settle in good faith." (Pet. App. 11.) The appellate court, therefore, held that "[b]ecause Agency did not have the exclusive right to settle claims arising from [the renter's] use of its rental car, Agency did not have a fiduciary duty to give good faith consideration to offers to settle" and therefore "could not have breached a fiduciary duty it did not have." (*Id.*) This holding is correct under the applicable Missouri law. *Ganaway, supra,* and *Zumwalt, supra*. There is, therefore, no need for this Court to exercise its supervisory jurisdiction over the Eighth Circuit.

The same is true for the Eighth Circuit's additional holding that the petitioner had no bad faith tort claim on which to sue because such claim (which purportedly had been assigned to her) was not assignable under Missouri law and therefore the purported assignment of such claim to her was invalid as a matter of law. (Pet. App. 11-12.) The general rule in Missouri is that personal injury actions are not assignable. *Beall v. Farmers' Exch. Bank*, 76 S.W. 2d 1098, 1099 (Mo. 1934); *Freeman v. Berberich*, 60 S.W. 2d 393, 401 (Mo. 1933); *Property Exch. & Sales, Inc. v. Bozarth*, 778 S.W. 2d 1, 2 n. 1 (Mo. App. 1989); *Forsthove v. Hardware Dealers Mut. Fire Ins. Co.*, 416 S.W. 2d 208, 217 (Mo. App. 1967). *See also Eastern Atl. Transp. & Mach. Eng'g, Inc. v. Dingman*, 727 S.W. 2d 418, 423 (Mo. App. 1987). *But see Ganaway*, 795 S.W. 2d at 565.

Although the petitioner relies on *Ganaway* and other cases for her argument to the contrary (Pet. 14-15), the other cases either are not on point, involve the law of a different state, or actually support the Eighth Circuit's holding. *Ganaway* involved an assignment of a bad faith tort claim by a bankruptcy trustee under the 1978 Bankruptcy Act. While the

Ganaway court stated that the "general law" also allowed such an assignment, that court cited no Missouri case to that effect (795 S.W. 2d at 565), and such statement is overwhelmingly contradicted by the Missouri cases cited above. As a result, the Eighth Circuit correctly decided not to follow *Ganaway*. *Forsthove*, 416 S.W. 2d at 213.

Finally, the Eighth Circuit correctly reversed the damage award and instructed the district court to enter judgment in the amount of damages allowable under Missouri law on the petitioner's breach of contract claim. Under Missouri law, the damages that may be awarded on a contract claim for failure to defend are limited to the contractual limit of liability, plus attorney fees, other defense costs, and interest where the plaintiff defended the underlying suit and paid the underlying judgment at his own expense. *See Zumwalt*, 228 S.W. 2d at 753, 756; *Landie v. Century Ins. Co.*, 390 S.W. 2d 558, 562, 564, 565 (Mo. App. 1965); *Southwestern Bell Tel. Co. v. Western Casualty & Sur. Co.*, 269 F. Supp. 315, 318 (E.D. Mo. 1967), *modified*, 396 F.2d 351, 355 (8th Cir. 1968). In this case, Agency's liability was limited by contract to $25,000 (Pet. 4-5; Pet. App. 38); attorney fees, other defense costs, and interest were not an issue since the petitioner's assignor (the renter) did not defend the case or pay the judgment. (Pet. 5-7.)

The cases cited by the petitioner for "[t]he general rule on the measure of damages" (Pet. 11) are not on point and have no application here. One is a civil rights action under federal law. The other two, although involving breach of contract, do not deal with a contract to defend and indemnify, like the one involved here. For such contracts Missouri has developed a special rule that limits damages to the contractual limit of liability, plus attorney fees, other defense costs, and interest incurred by the plaintiff in defending the underlying suit and paying the underlying judgment. *See Zumwalt, supra*; *Landie, supra*; and *Southwestern Bell, supra*.

Accordingly, the Eighth Circuit's decision in this case is correct under Missouri law, and there is no need for this Court to exercise its supervisory powers over the appellate court.

III.

THERE IS NO CONFLICT WITH OTHER CIRCUITS, WITHIN THE EIGHTH CIRCUIT, OR WITH MISSOURI LAW AS TO THE PROPER MEASURE OF DAMAGES: ANY APPARENT CONFLICT RESULTS FROM THE APPLICATION OF THE DISPARATE LAW OF DIFFERENT STATES IN DIVERSITY ACTIONS, OR FROM THE DIFFERENT CLAIMS INVOLVED IN EACH CASE.

The asserted conflict between the Eighth Circuit's decision on the appropriate measure of damages on a contract claim for failure to defend in this case and the decisions of other circuits in other cases (Pet. 12) is only apparent, and not real. A review of the cases relied on by the petitioner to establish the purported conflict reveals that they were all diversity cases decided, respectively, under Texas, California, Illinois, North Carolina, and Kansas law. This case, however, was decided under Missouri law. Thus, any apparent conflict between the circuits is the result of the application of the disparate law of different states, and not the result of any inconsistency among the circuits requiring conformation by a decision of this Court.

Moreover, none of those cases are even on point. *Consolidated Amer. Ins. Co. v. Mike Soper Marine Servs.*, 951 F.2d 186 (9th Cir. 1991), and *Gray v. Grain Dealers Mut. Ins. Co.*, 871 F.2d 1128 (D.C. Cir. 1989), both affirmed awards of damages in excess of the contractual liability limits, not on a contract claim for failure to defend, but on a tort claim for bad

faith refusal to settle. *Consolidated Amer.*, 951 F.2d at 190; *Gray*, 871 F.2d at 1130. Similarly, *Green v. J.C. Penney Auto Ins. Co.*, 806 F.2d 759, 762-64 (7th Cir. 1986), and *Coleman v. Holecek*, 542 F.2d 532, 534, 536-38 (10th Cir. 1976), allowed an award of damages in excess of the contractual limit of liability only where there was fraud, bad faith, or negligence in failing to settle. Here, of course, the Eighth Circuit held that the petitioner had no tort claim for bad faith refusal to settle. This difference is critical as the Missouri courts have recognized in *Zumwalt, supra*; *Landie, supra*; and *Southwestern Bell, supra*; which are discussed above. In *Columbia Mut. Ins. Co. v. Fiesta Mart, Inc.*, 987 F.2d 1124, 1129, *reh'g en banc denied*, 992 F.2d 326 (5th Cir. 1993), the court reversed a summary judgment for the insured, and rendered judgment for the insurer. It did not even discuss the measure of damages.

Nor is there any conflict between the Eighth Circuit's decision in this case and the other Missouri or Eighth Circuit decisions cited by the petitioner. *Landie* involved both a contract claim for failure to defend and a tort claim for bad faith refusal to settle. 390 S.W. 2d at 561, 563. The court held that the damages on the contract claim for failure to defend were limited to the contractual limit of liability, plus attorney fees, other defense costs, and interest the plaintiff had incurred in defending the underlying case, but that damages on the tort claim for bad faith refusal to settle could exceed the contractual limit of liability. *Id.* at 562-66. Only because the court found that the jury could have found that the insurance company refused to settle in bad faith did the court affirm the judgment for damages in excess of the contractual limit of liability. *Id.* at 566.

In *Fuller v. Lloyd*, 714 S.W. 2d 698, 700 (Mo. App. 1986), there was no discussion of the contractual limit of liability, and

it seems apparent that the judgment on the contract claim for failure to defend did not exceed any contractual limit since that judgment was only for $25,000—the minimum amount of insurance coverage required by Missouri's Financial Responsibility Law. R.S. Mo. § 303.190(2)(2) (Pet. App. 29). The additional amount awarded to the insured was not for failure to defend but for wrongful denial of coverage which caused the insured to lose his driver's license. 714 S.W. 2d at 702. No similar claim was involved in our case.

Luke v. American Family Mut. Ins. Co., 476 F.2d 1015, *cert. denied*, 414 U.S. 856 (8th Cir. 1973), presents no conflict for two reasons. First, even though it also was decided by the Eighth Circuit, *Luke* was decided under South Dakota law, not under Missouri law. *Id.* at 1018-22, 1023. Second, the damage award was affirmed in *Luke* based on the insurance company's bad faith refusal to settle, not on a contract claim for failure to defend, and based on a specific South Dakota statute prescribing the measure of damages. *Id.* at 1020-21, 1023.

Carpenter v. Automobile Club Interinsurance Exch., 58 F.3d 1296 (8th Cir. 1994), likewise presents no conflict. It was decided under Arkansas law, not Missouri law, and was a bad faith refusal to settle case, not a breach of contract failure to defend case. *Id.* at 1302-03. As a result, there is no conflict for this Court to resolve.

CONCLUSION

This case presents no constitutional question, no conflict between circuits, within the Eighth Circuit, or with Missouri law, and no need for this Court to exercise its supervisory power over the Eighth Circuit. This case presents only questions of Missouri law, which were correctly decided by the Eighth Circuit. Accordingly, the writ should be denied.

Respectfully submitted,

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APPENDIX A — DEFENDANT'S MOTION FOR JUDGMENT AS A MATTER OF LAW

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
SOUTHERN DIVISION

Case No. 93-3455-CV-S-4

KATHLEEN QUICK, an individual, assignee of Kendrick Wilhite,

Plaintiff,

v.

AGENCY RENT-A-CAR, INC., a Delaware Corporation,

Defendant.

JUDGMENT AS A MATTER OF LAW

Comes now defendant, Agency Rent-A-Car, and pursuant to Rule 50(a)(1) of the Federal Rules of Civil Procedure moves this court for Judgment as a Matter of Law on plaintiffs' complaint in that there is no legally sufficient evidentiary basis for a reasonable jury to find for plaintiff on any issues in their Complaint and for further grounds states as follows:

FACTS

Plaintiffs' entire case is based on their allegation that the rental agreement required that a policy of insurance be provided to Kendrick Wilhite or that Agency Rent-A-Car Inc.,

is or should be treated as an automobile liability insurance company. Plaintiffs have failed to prove and, in fact, there has been no evidence whatsoever that defendant ever had a duty to provide a policy of automobile insurance.

Additionally, plaintiffs' recovery depends on a duty owed by a liability insurance company to its insured under a policy of automobile liability insurance. Plaintiffs have not presented any evidence that Agency Rent-A-Car was a automobile liability insurance company or that Kendrick Wilhite was a policy owner or an insured under any policy of insurance.

Plaintiffs' claim for bad faith and refusal to settle is a tort arising out of the actions of an automobile liability insurance company in dealing with its insureds. The tort of bad faith does not exist as such through any other relationship arising out of any other contract than that between an automobile insurance company and insured. Plaintiff has not presented any evidence supporting a duty on the part of Agency Rent-A-Car to have settled the claims against Kendrick Wilhite prior to a judgment being entered.

LAW AND ARGUMENT

Section 379.110 of the Revised Statutes of Missouri defines an insurer under the section which governs and regulates insurance companies other than life insurance companies.

Subparagraph (1), of that section defines insurer as "any insurance company, association or exchange authorized to issue policies of automobile insurance in the State of

Missouri." The Eighth Circuit Court of Appeals has held that private indemnity agreements collateral to the main business or transaction between the parties is not an insurance contract. *St. John's Regional Health Center v. American Casualty Company of Reading, Pennsylvania*, 980 F.2d 1222 (8th Cir 1992).

Further, in Missouri, it is clear that a certificate of self insurance filed with the state in compliance the financial responsibility laws does not require the defendant to assume all the obligations of a liability insurance company. *American Family Mutual Insurance Co. v. Missouri Power and Light Co.*, 517 S.W. 2d 110 (Mo banc 1975).

There is no Missouri case which imposes liability for the tort of bad faith on any entity other than an insurance company for its dealings with its insured. Since plaintiff has not presented any evidence that Agency Rent-A-Car is an insurance company or that there was a policy of insurance entered into between plaintiff's assignor, Kendrick Wilhite, and Agency Rent-A-Car, there can be no tort of bad faith in the dealings between the two entities and defendant is entitled to judgment as a matter of law on plaintiff's claim of bad faith under this theory.

Plaintiff's claim for punitive or exemplary damages should be dismissed in that there is no cause of action recognized in Missouri for punitive damages arising strictly from a breach of contract action and plaintiff has not presented any evidence to support the allegation that Agency Rent-A-Car is an insurance company subject to the provisions of the tort of bad faith or punitive or exemplary damages arising therefrom.

Appendix A

As to plaintiff's claim for breach of contract, defendant is also entitled to judgment as a matter of law. Plaintiffs have not presented any evidence that there was a breach of any duty owed to Kendrick Wilhite under the rental agreement. Kendrick Wilhite, as indemnitee, has not been called on to pay any amount of the judgment and the rental contract specifically states that Agency Rent-A-Car will pay up to $25,000 of any amount that Kendrick Wilhite is required to pay by way of judgment or settlement.

Moreover, any damage to Kendrick Wilhite was due to his own breach in failing to notify Agency of the summons and complaint served on him and his failure to appear on the date indicated to protect his own interest and the interest of the indemnitor, Agency Rent-A-Car Inc. as required in the rental agreement.

Wherefore, Agency Rent-a-Car Inc., moves this court for Judgment as a Matter of Law on plaintiff's claims of breach of Contract, Bad Faith, and Tortious Breach of Contract, and for its costs and attorney's fees herein expended pursuant to the rental agreement.

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APPENDIX B — EXCERPTS OF DEFENDANT'S MOTION FOR JUDGMENT AS A MATTER OF LAW AT THE CLOSE OF ALL THE EVIDENCE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
SOUTHERN DIVISION

Case No. 93-3455-CV-S-4

KATHLEEN QUICK, an individual, assignee of Kendrick Wilhite,

Plaintiff,

v.

AGENCY RENT-A-CAR, INC., a Delaware Corporation,

Defendant.

JUDGMENT AS A MATTER OF LAW AT THE CLOSE OF ALL THE EVIDENCE

Comes now defendant, Agency Rent-A-Car, and pursuant to Rule 50(a)(1) of the Federal Rules of Civil Procedure moves this court for Judgment as a Matter of Law on plaintiffs' complaint in that there is no legally sufficient evidentiary basis for a reasonable jury to find for plaintiff on any issues in their Complaint and for further grounds states as follows:

FACTS

Plaintiffs' entire case is based on their allegation that the rental agreement required that a policy of insurance be

provided to Kendrick Wilhite or that Agency Rent-A-Car Inc., is or should be treated as an automobile liability insurance company. Plaintiffs have failed to prove and, in fact, there has been no evidence whatsoever that defendant ever had a duty to provide a policy of automobile insurance.

Additionally, plaintiffs' recovery depends on a duty owed by a liability insurance company to its insured under a policy of automobile liability insurance. Plaintiffs have not presented any evidence that Agency Rent-A-Car was a automobile liability insurance company or that Kendrick Wilhite was a policy owner or an insured under any policy of insurance.

Plaintiffs' claim for bad faith and refusal to settle is a tort arising out of the actions of an automobile liability insurance company in dealing with its insureds. The tort of bad faith does not exist as such through any other relationship arising out of any other contract than that between an automobile insurance company and insured. Plaintiff has not presented any evidence supporting a duty on the part of Agency Rent-A-Car to have settled the claims against Kendrick Wilhite prior to a judgment being entered.

LAW AND ARGUMENT

Section 379.110 of the Revised Statutes of Missouri defines an insurer under the section which governs and regulates insurance companies other than life insurance companies.

Subparagraph (1), of that section defines insurer as "any insurance company, association or exchange authorized to

issue policies of automobile insurance in the State or Missouri." The Eighth Circuit Court of Appeals has held that private indemnity agreements collateral to the main business or transaction between the parties is not an insurance contract. *St. John's Regional Health Center v. American Casualty Company of Reading, Pennsylvania*, 980 F.2d 1222 (8th Cir 1992).

Further, in Missouri, it is clear that a certificate of self insurance filed with the state in compliance the financial responsibility laws does not require the defendant to assume all the obligations of a liability insurance company. *American Family Mutual Insurance Co., v. Missouri Power and Light Co.*, 517 S.W. 2d 110 (Mo banc 1975).

There is no Missouri case which imposes liability for the tort of bad faith on any entity other than an insurance company or its dealings with its insured. Since plaintiff has not presented any evidence that Agency Rent-A-Car is an insurance company or that there was a policy of insurance entered into between plaintiff's assignor, Kendrick Wilhite, and Agency Rent-A-Car, there can be no tort of bad faith in the dealings between the two entities and defendant is entitled to judgment as a matter of law on plaintiff's claim of bad faith under this theory.

Plaintiff's claim for punitive or exemplary damages should be dismissed in that there is no cause of action recognized in Missouri for punitive damages arising strictly from a breach of contract action and plaintiff has not presented any evidence to support the allegation that Agency Rent-A-Car is an insurance company subject to the provisions of the tort of bad faith or punitive or exemplary damages arising therefrom.

Appendix B

As to plaintiff's claim for breach of contract, defendant is also entitled to judgment as a matter of law. Plaintiffs have not presented any evidence that there was a breach of any duty owed to Kendrick Wilhite under the rental agreement. Kendrick Wilhite, as indemnitee, has not been called on to pay any amount of the judgment and the rental contact specifically states that Agency Rent-A-Car will pay up to $25,000 of any amount that Kendrick Wilhite is required to pay by way of judgment or settlement.

* * *

APPENDIX C — EXCERPTS OF DEFENDANT'S MOTION FOR A NEW TRIAL OR IN THE ALTERNTIVE FOR JUDGMENT AS A MATTER OF LAW

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
SOUTHERN DIVISION

Case No. 93-3455-CV-S-4

KATHLEEN QUICK, an individual, assignee of Kendrick Wilhite,

Plaintiff,

v.

AGENCY RENT-A-CAR, INC., a Delaware Corporation,

Defendant.

DEFENDANT AGENCY RENT-A-CAR INC.'S MOTION FOR A NEW TRIAL OR IN THE ALTERNATIVE, MOTION FOR JUDGMENT AS A MATTER OF LAW

Comes now defendant, Agency Rent-A-Car, and pursuant to Rules 59 and 50 of the Federal Rules of Civil Procedure moves this court to set aside and hold for naught the verdict and judgment entered in favor of plaintiff and against defendant, and grant a new trial, or in the alternative, enter judgment as a matter of law on behalf of Defendant, and for grounds therefore states as follows:

1. The court erred in denying defendant's Motion for a Judgment as a Matter of Law in its favor at the close of

plaintiff's case because, as a matter of law, plaintiff is not entitled to recover as more fully set out in the motion.

2. The court erred in denying defendant's Motion for a Judgment as Matter of Law in its favor at the close of all the evidence because, as a matter of law, plaintiff is not entitled to recover as more fully set out in the motion.

3. The evidence is insufficient to support a finding in favor of plaintiff and against defendant.

4. Defendant is entitled to judgment in its favor as a matter of law.

5. The verdict is contrary to law.

6. The verdict is contrary to the evidence.

7. The verdict is contrary to the law and the evidence.

* * *

APPENDIX D — EXCERPTS OF BRIEF OF APPELLANT NATIONAL AUTO CREDIT, INC.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 95-3989 WMS

KATHLEEN QUICK, ASSIGNEE OF
KENDRICK WILHITE

Appellee,

vs.

NATIONAL AUTO CREDIT, INC.
f/k/a AGENCY RENT-A-CAR, INC.

Appellant.

Appeal from the United States District Court
for the Western District of Missouri
Southern Division
Honorable Russell G. Clark, District Judge

BRIEF OF APPELLANT NATIONAL AUTO CREDIT, INC.

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Missouri law does not recognize a claim of bad faith outside the insurance company and insured context. In fact, counsel has found no Missouri cases that recognize the tort cause of action of bad faith in the noninsurance context. Although recognized in California, courts outside of California have almost unanimously refused to apply the tort claim of bad faith in the noninsurance situation. *See* Alabama, *Peninsular Life Ins. Co. v. Blackmon*, 476 So. 2d 87 (Ala 1985); Colorado, *Strey v. Hunt Int'l Resources Corp.*, 749 F.2d 1437 (10th Cir. 1984); Illinois, *Chicago College of Osteopathic Medicine v. George A. Fuller Co.*, 719 F.2d 1335 (7th Cir. 1983); Nevada, *Aluevich v. Harrah's*, 660 P.2d 986 (Nev. 1983), *cert. denied*, 465 U.S. 1006 (1984); New York, *French American Banking Corp. v. Flota Mercante Grancolombiana, S.A.*, 609 F. Supp 1352 (S.D.N.Y. 1985); Ohio, *Battista v. Lebanon Trotting Ass'n*, 538 F.2d 111 (6th Cir. 1976); Pennsylvania, *Iron Mountain Sec. Storage Corp. v. American Specialty Foods. Inc.*, 457 F.Supp. 1158 (E.D. Pa. 1978); Texas, *Exxon Corp. v. Atlantic Richfield Co.*, 678 S.W.2d 944 (Tex. 1984); Wisconsin, *Jack Walters & Sons Corp. v. Morton Bldg.*, 737 F.2d 698 (7th Cir. 1984).

Assuming arguendo, that Agency is not a rental car company, but rather a liability insurer, and Quick could jump that essential first hurdle, her claim still must fail as she did not establish the four elements of a claim of bad faith under Missouri law.

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* * *

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* * *

III. THE JUDGMENT IN FAVOR OF PLAINTIFF SHOULD BE REVERSED AND REMANDED WITH DIRECTIONS TO ENTER JUDGMENT IN FAVOR OF AGENCY BECAUSE THE TRIAL COURT ERRED BY OVERRULING AGENCY'S MOTION FOR A DIRECTED VERDICT AT THE CLOSE OF ALL THE EVIDENCE AND MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT, OR IN THE ALTERNATIVE, THE COURT ERRED IN OVERRULING DEFENDANT'S MOTION FOR A NEW TRIAL, BECAUSE PLAINTIFF DID NOT HAVE STANDING TO PROSECUTE CLAIMS OF KENDRICK WILHITE UNDER MISSOURI LAW, AND THEREFORE, NO CAUSE OF ACTION WAS BEFORE THE COURT AND THE TRIAL COURT LACKED SUBJECT MATTER JURISDICTION AND ANY ACTION WHICH THE COURT TOOK WAS NULL AND VOID.

The tort of bad faith refusal to settle is not assignable under Missouri common law. *State ex rel Park Nat. Bank v. Globe Indemnity Co.*, 61 S.W.2d 733, 736 (Mo. 1933). There have been two situations in which the courts have allowed the common law rule of nonassignability of torts to be circumvented by holding that there is support in the Bankruptcy Code or the Probate Code that would support their assignability. In *Ganaway*, the court stated that the 1978

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Bankruptcy Act supports the proposition that the bad faith cause of action is assignable. *Ganaway v. Shelter Mutual Insurance Company*, 795 S.W.2d 554 (Mo.App.S.D. 1990). The court stated that since "all legal or equitable interests of the debtor" become part of the estate in bankruptcy, then the cause of action is capable of being assigned. *Ganaway v. Shelter Mutual Insurance Company*, 795 S.W.2d at 564 (citing 11 U.S.C.A. Sec. 541 (a)(1) (West 1979)). This legal fiction has no application to this suit. Clearly a claim for personal injuries in Missouri survives to the injured/bankrupt's estate. However, that same injured person could not sell or assign his personal injury claim to another individual or a corporation outside of bankruptcy. Furthermore, the trustee in bankruptcy cannot put the personal injury claim for sale or assignment to the highest bidder.

Other courts have held that the test for assignability of a claim is simply a question of whether the claim could or would survive the death of the injured person and be available to a personal representative. They have held if the claim would survive to the personal representative, it is assignable. *Emmendorfer v. Crader Tire & Retread Service*, 670 S.W.2d 548 (Mo.App. 1984), (citing *State ex rel. Park Nat. Bank v. Globe Indemnity Company*, 61 S.W.2d 733, 735 (Mo. 1933)). This legal fiction also does not hold true under Missouri law. While an injured party's claim survives to his personal representative, the same claim could not be put on the auction block by the injured party prior to their death. Moreover, the personal representative cannot sell this cause of action even though it becomes part of the decedent's estate.

Therefore, since the purported assignment was invalid, plaintiff had no standing to bring to bring a claim in the name

of Wilhite for the tort of bad faith, and any action that the court took was null and void as that claim was not properly before the court.

IV. A. IN THE ALTERNATIVE, THE JUDGMENT IN FAVOR OF PLAINTIFF SHOULD BE REVERSED AND REMANDED WITH DIRECTIONS TO ENTER JUDGMENT IN FAVOR OF AGENCY BECAUSE THE TRIAL COURT ERRED BY OVERRULING AGENCY'S MOTION FOR A DIRECTED VERDICT AT THE CLOSE OF ALL THE EVIDENCE AND MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT, OR IN THE ALTERNATIVE, THE COURT ERRED IN OVERRULING DEFENDANT'S MOTION FOR A NEW TRIAL:

A. BECAUSE PLAINTIFF: DID NOT HAVE STANDING TO BRING A CLAIM FOR PUNITIVE DAMAGES UNDER MISSOURI LAW AND THEREFORE, THAT CAUSE OF ACTION WAS NOT BEFORE THE COURT AND THE TRIAL COURT AGREED SUBJECT MATTER JURISDICTION WITH THAT CLAIM AND ANY ACTION THE COURT TOOK WITH REGARD TO PUNITIVE DAMAGES AS NULL AND VOID; AND THE CAUSE OF ACTION THAT WAS PURPORTEDLY ASSIGNED FOR PUNITIVE DAMAGES WAS INVALID BECAUSE PUNITIVE DAMAGES IN THIS CASE ARE PURELY PERSONAL IN NATURE AND WERE NOT REDUCED TO A JUDGMENT AND THEREFORE THE ASSIGNEE COULD NEVER BE ASSIGNED THAT CLAIM UNDER MISSOURI LAW; AND,

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* * *

In both law and equity, a cause of action sounding in tort cannot be assigned. Missouri's common law prohibits the assignment of causes "for torts for personal injuries, and for wrongs done to the person, the reputation or the feelings of the injured party, and those based on contracts of a purely personal nature . . ." *State ex rel Park Nat. Bank v. Globe Indemnity Co.*, 61 S.W.2d 733, 736 (Mo. 1933).

In this case, plaintiff Kathleen Quick did not have standing in this suit to bring a claim of punitive damages against Agency. Again, personal injury causes of action in Missouri, as in most jurisdictions, are not assignable. *Marshall v. Northern Assurance Co. of America*, 854 S.W.2d 608 (Mo.App. 1993); *Travelers Indem. Co. v. Chumbley*, 394 S.W.2d 418 (Mo.App. 1965); *Reese v. Preferred Risk Mut. Ins. Co.*, 457 S.W.2d 205 (Mo.App. 1970); and *Jones v. Aetna Casualty & Sur. Co.*, 497 S.W.2d 809 (Mo. App. 1973). A complaint "which pleads such an assignment does not plead a cause of action." *Chuning v. Calvert*, 452 S.W.2d 580, 584 (W.D. 1970). A complaint that does not plead a cause of action:

> is insufficient to call into being the court's jurisdiction. A verdict will not cure such a [complaint] and no valid judgment can be entered upon it, and if entered, cannot be enforced.

452 S.W.2d at 584.

While courts have acknowledged the nonassignability of a personal injury action, some courts have made a distinction

between an assignment of the action itself and the assignment of a claim in which the damages are liquidated and reduced to a judgment. *Marshall v. Northern Assurance Co. of America*, 854 S.W.2d at 610 (Mo.App. 1993).

In the instant case, although the assignor Wilhite may have been able to argue a claim of punitive damages to the jury himself, his assignee, Kathleen Quick, did not have standing to prosecute Wilhite's claim in this regard. Any claim for punitive damages is "purely personal" and cannot be assigned. The same is true if the assignee attempted to bring a claim on behalf of Wilhite for "negligent infliction of emotional distress," as Missouri law prohibits the assignability of such a personal claim not reduced to a judgment. *Forsthove v. Hardware Dealers Mut. Fire Ins. Co.*, 416 S.W.2d 208 (Mo.App. 1965).

Unliquidated claims for punitive damages and other purely personal torts have also been held not assignable by courts in California, which has been at the forefront of the tort of bad faith and has extended the bad faith cause of action to first party and commercial breach of contract scenarios. *Reichert v. General Insurance Company of America*, 68 Cal.2d 822, 834 (1968). *Dugar v. Happy Tiger Records Inc.*, 41 . . .

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In this diversity action, the trial court must correctly state the law in the jury instructions and the verdict director must properly set forth the elements of the plaintiff's prima facie case and inform the jury of the proper legal standard. *Bersett v.*

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K-Mart Corporation, 869 F.2d 1131, 1135 (8th Cir. 1989); *Robinson v. Monsanto Company*, 758 F.2d 331, 335 (8th Cir. 1985); *Hrzenak v. White-Westinghouse Co.*, 682 F.2d 714, 719 (8th Cir. 1982).

Bad faith as a tort action was first recognized in Missouri in 1950 in the Missouri Supreme Court case of *Zumwalt et al. v. Utilities Ins. Co.*, 228 S.W.2d 750 (Mo. 1950). *Zumwalt* remains the controlling case on bad faith in the state of Missouri.

In recognizing this tort, the Court set forth the necessary criteria for recovery. The Missouri Supreme Court held:

> We have reviewed many authorities on the question and think the weight of authority is that where the insurer in a liability policy reserves the exclusive right to contest or settle any claim brought against an assured, and prohibits him from voluntarily assuming any liability or settling any claims without the insurer's consent, except at his own costs, and the provisions of the policy provide that the insurer may compromise or settle such a claim within the policy limits, no action will lie against the insurer for the amount of the judgment recovered against the insured in excess of the policy limits, unless the insurer is guilty of fraud or bad faith in refusing to settle a claim within the limits of the policy.

Zumwalt at 753.

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In this action, there is no liability policy of insurance, or, in other words, an insurance contract which would support the giving of this instruction. (See Plaintiff's Exhibit 16 admitted into evidence). There is only an indemnity agreement. An indemnity agreement is not an a contract of insurance. *Holiday Inns, Inc. v. Thirteen-Fifty Investment Co.*, 714 S.W.2d 597, 602 (Mo.App.W.D. 1986). As a result, this defendant cannot come within the confines of the principles set fort in *Zumwalt*.

In addition, the agreement between defendant and plaintiff's assignee, Wilhite, does not give defendant the *exclusive* right to contest or settle any claim brought against Wilhite. The reverse is equally true in that the agreement does not prohibit Wilhite from voluntarily assuming any liability or settling any claims without this defendant's consent, except at Wilhite's own costs.

Under the holding of *Zumwalt*, the bad faith tort recognized by the Missouri Supreme Court, by its very language, could not apply to this defendant. As a result, the instruction submitted to the jury is not a clear, concise and correct statement of the law.

The Instructions submitted to the jury improperly allowed the jury to find plaintiff's assignor's indemnitor was controlled by the confines of the bad faith principles applicable to insurance contracts, contrary to the holdings of the Missouri Supreme Court.

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VI. THE TRIAL COURT ERRED IN REFUSING TO SUBMIT INSTRUCTION C AS THAT INSTRUCTION WAS SUPPORTED BY THE EVIDENCE AND PROPERLY SETS FORTH AGENCY'S RIGHT TO BE DISCHARGED UNDER ITS INDEMNITY CONTACT WITH WILHITE DUE TO WILHITE'S PREJUDICIAL CONDUCT.

Defendant tendered an instruction, which was refused, to the court which set forth the obligations of plaintiff's assignor to Agency under the rental agreement.

The rental agreement contained the following language:

> 1. Lessor will settle or defend as it considers appropriate, any claim or suit seeking damages for bodily injury and or property damage up to the MINIMUM dollar amount required for any one (1) rental automobile, per occurrence. . . . The foregoing indemnification and hold harmless provisions shall be applicable only to losses arising out of the authorized use of the vehicle. . . .

See Plaintiffs Exhibit 16, The Rental Agreement, entered into evidence.

By this language, defendant complies with the Financial Responsibility Laws of Missouri. *See generally*, R.S.Mo. 303.010 et seq. The only requirement imposed on a self-insured[2] is that it will pay the same judgments in the same

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2. "Self insured," as used in the Motor Vehicle Financial Responsibility (Cont'd)

amounts as if it had issued a policy. The agreement provides, in compliance with this statute, for indemnification of Wilhite in the event of an occurrence while driving the rental vehicle. Missouri recognizes this type of indemnification agreement. *Moberly v. Leonard et al.*, 99 S.W.2d 58, 63 (Mo. 1936).

Had the Missouri legislature wished to require other obligations of a "self insured" under the Motor Vehicle Financial Responsibility Laws, it surely would have set those obligation out in the statute.

The agreement between Agency and Wilhite does several things; all of which need to be analyzed separately. The agreement obligates Agency (1) to defend or (2) to settle the claims. This obligation is controlled further by Agency's right to settle "as it considers appropriate." The agreement also sets forth that the (3) indemnification and hold harmless agreement arises only from the authorized use of the rental vehicle. The indemnification is provided as compliance with the applicable motor vehicle financial responsibility laws and is for the payment of judgments in the same amounts as an insurer.

Instruction Number 6 places additional obligations on the defendant pursuant to the indemnification agreement which are not appropriate.

In sum, Agency's obligations to Wilhite were: to defend to

(Cont'd)
Law of Missouri, is really to say "uninsured" since upon demonstrating a certain ability to pay judgments, the "self insured" is permitted to comply with the Financial Responsibility Law by being uninsured. *See generally* 303.220 R.S.Mo. 1989.

the limits of the liability protection, to settle within Agency's discretion and to indemnify and hold harmless Wilhite to the minimum financial responsibility law requirements.

None of these obligations constitute insurance or somehow transform Agency into an insurance company, particularly in light of the extensive statutory scheme in place by the Missouri Legislature controlling motor vehicle insurers. *See generally*, Revised Statutes of Missouri, Chapter 374, Department of Insurance; Chapter 375, Provisions Applicable to All Insurance Companies; Chapter 378, Fraternal Benefits Societies; Chapter 379, Insurance Other Than Life.

The obligations of the parties must be considered as parties to an indemnity contract and not as some fictional creation of an insured/insurer relationship. Contracts of indemnity are not synonymous with contracts of insurance. *Holiday Inns, Inc. v. Thirteen-Fifty Investment Co.*, 714 S.W.2d 597, 602 (Mo.App.W.D. 1986), *Pennsylvania R. Co. v. Roydhouse et al.*, 110 A. 277, 278 (Pa. 1920).

This relationship of indemnitor/indemnitee creates duties on both sides of the contract, not just upon one party.

Given the indemnitor/indemnitee relationship between Wilhite and Agency, the general rule controlling the relationship comes into play. That general rule is: any act on the part of an indemnitee which materially increases the risk, or prejudices the rights, of an indemnitor, will discharge the indemnitor under the contract of indemnity. *Holiday Inns, Inc.* at 603; *American Casualty Company of Reading, Pennsylvania v. Idaho First National Bank*, 328 F.2d 138, 142-

43 (9th Cir. 1964); *Hiern v. St. Paul-Mercury Indemnity Company*, 262 F.2d 526, 529 (5th Cir. 1959); *Rochelle Bail Agency, Inc. v. Maryland National Insurance Company*, 484 F.2d 877, 878 (7th Cir. 1973).

* * *

APPENDIX E — EXCERPTS OF REPLY BRIEF OF APPELLANT NATIONAL AUTO CREDIT, INC.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Consolidated Nos. 94-3989 and 95-1045

KATHLEEN QUICK, ASSIGNEE OF KENDRICK WILHITE

Appellee,

vs.

NATIONAL AUTO CREDIT, INC. f/k/a AGENCY RENT-A-CAR, INC.

Appellant.

Appeal from the United States District Court
for the Western District of Missouri
Southern Division
Honorable Russell G. Clark, District Judge

REPLY BRIEF OF APPELLANT NATIONAL AUTO CREDIT, INC.

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Appendix E

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ARGUMENT.

I. AGENCY IS NOT AN INSURANCE COMPANY AND, THEREFORE, CANNOT BE HELD LIABLE FOR THE TORT OF BAD FAITH REFUSAL TO SETTLE.

Under Missouri law, only an insurance company can be held liable for the tort of bad faith refusal to settle a claim. *Compare Zumwalt v. Utilities Ins. Co.*, 228 S.W.2d 750, 753 (Mo. 1950), *and State Farm Fire & Cas. Co. v. Metcalf, by Wade*, 861 S.W.2d 751, 756 (Mo. App. 1993), *with Peterson v. Continental Boiler Works, Inc.*, 783 S.W.2d 896, 903 (Mo. 1990). As a result, plaintiff was required to prove that Agency is an insurance company in order to prove her case for bad faith refusal to settle. *Zumwalt*, 228 S.W.2d at 753 ("**insurer**" only liable for fraud or bad faith in refusing to settle claim within the limits of the **policy**); *State Farm*, 861 S.W.2d at 756 (an element of bad faith claim is that "**insurer** refuses to settle the claim within the liability limits of the **policy**"). This plaintiff failed to do. Consequently, the district court incorrectly instructed the jury on the claim of bad faith refusal to settle. (Instruction 8). The judgment against Agency, therefore, must be reversed, and judgment entered for Agency.[2]

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2. It is indisputable that the jury returned a verdict for plaintiff on plaintiff's claim for bad faith refusal to settle. The jury awarded plaintiff (Cont'd)

Appendix E

In order to be an insurance company under Missouri law, a company must be licensed by the Missouri Department of Insurance to do insurance business in Missouri. *See State on Inf. of McKittrick v. Koon,* 201 S.W.2d 446, 452 (Mo. 1947) (person cannot engage in insurance business without complying with state statutes regulating same); *see also* 19 J. Appleman, Insurance Law & Practice § 10411, p. 261 (1982) ("No insurance company is entitled to do business within a state unless it first procures a license or certificate of authority from the state or proper administrative officials"). *See generally,* Mo. Rev. Stat. chs. 374-385 (481 pages of Missouri statutes, ranging from the general powers of the department of insurance through regulation of insurance companies and agents); *Code of State Regulation,* Tit. 20 (regulations related to the insurance laws).

The regulation of insurance companies transacting the business of insurance in the State of Missouri is broad and comprehensive and touches nearly every aspect of an insurance company's operations. To be licensed in Missouri as an insurance company requires compliance with the numerous state statutes and regulations. Missouri statutes prohibit any company from engaging in the business of insurance in this state without first complying with all provisions of the laws of

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(Cont'd)
punitive damages of $885,000, which only could have been awarded on the claim for bad faith refusal to settle. *See Landie v. Century Indemnity Co.,* 390 S.W.2d 558, 563-66 (Mo. App. 1965) (damages for failure to defend limited to contract damages; damages for bad faith refusal to settle go beyond contract damages); *Zumwalt,* 228 S.W.2d at 756 (action for insurer's bad faith refusal to settle "is a tort action"). Plaintiff's only other claim that was submitted to the jury was for breach of contract for failure to defend, and Missouri law is clear that punitive damages cannot be awarded for a breach of contract. *Peterson,* 783 S.W.2d at 902-03; *see Zumwalt,* 228 S.W.2d at 756.

this state governing the business of insurance. Mo. Rev. Stat. § 375.158 (1994).

Moreover, a company is prohibited from transacting any insurance business in Missouri until it procures from the Missouri Director of Insurance a certificate stating that it has complied with the requirements of the insurance laws of this state and is authorized to do business. Before a certificate of authority can be issued, a company that wishes to engage in the insurance business is investigated extensively by the director of insurance. *See generally,* Mo. Rev. Stat. § 375.166, 375.183, 375.201-375.226 (1994). Once the extensive requirements are met, the Missouri Director of Insurance issues a certificate of authority to do business as an insurance company in Missouri. Mo. Rev. Stat. § 375.161 (1994). These certificates of authority are renewed annually. *Id.* at § 375.161 (1994).

Plaintiff failed entirely to prove that Agency is or was an insurance company under Missouri law — and could not do so if she had tried. As is perfectly clear from the record, Agency is a car rental company, not an insurance company. Thus, plaintiff did not place in evidence any certificate issued by the Missouri Director of Insurance authorizing Agency to do insurance business in Missouri. Nor did plaintiff prove that Agency met any of the statutory requirements to do insurance business in Missouri. Plaintiff's arguments that Agency is "like an insurance company," do not prove that Agency is an insurance company. The indisputable fact is that Agency is a car rental company, not an insurance company.

Plaintiff's introduction of Agency's certificate as a self-insured under Missouri's financial responsibility law is of no

moment. "The plain purpose [of the Missouri Financial Responsibility Law] is to make sure that people who are injured on the highways may collect damage awards, **within limits**, against negligent motor vehicle operators." *Halpin v. American Family Mut. Ins. Co.*, 823 S.W.2d 477, 482 (Mo. 1992). The self-insured certificate does not establish that Agency is an insurance company.

"A self-insurer is not engaged in the insurance business." 19 J. Appleman, Insurance Law & Practice § 10411, p. 263 (1982). *See Reeves v. Wright & Taylor*, 220 S.W.2d 1007, 1010 (Ky. 1949) (car rental company held not to be in insurance business by complying with state financial responsibility law). As the highest court in Kentucky held in *Reeves*, under the Kentucky Motor Vehicle Safety-Responsibility Act:

> Clearly, the owner of the leased automobiles is not engaged in the insurance business when he procures a certificate of self-insurance from the Department of Revenue in lieu of a liability insurance policy. The certificate merely shows that he had produced evidence of financial responsibility.

Id.

Thus, Agency's self-insurance certificate **does not establish** that Agency was a liability **"insurer"**; it establishes exactly the opposite: that Agency was not a liability insurer. *See American Family Mut. Ins. Co. v. Missouri Power & Light Co.*, 517 S.W.2d 110, 112-14 (Mo. 1974). In American *Family*, the Missouri Supreme Court, after a careful review of the applicable sections of the Missouri Motor Vehicle Safety

Responsibility Law, held that the statutory obligations of an automobile self-insurer did not constitute insurance. *Id.* at 112-14. The Missouri Supreme Court quoted, with approval, the following pertinent passage from *Home Indemnity Co. v. Humble Oil & Refg. Co.*, 314 S.W.2d 861, 865-66 (Tex. Civ. App. 1958):

> To say that a self-insurer will pay the same judgments and in the same amounts as an insurance company would have to pay is one thing; while it is obvious that to assume all the obligations that exist under a Standard Automobile Liability Policy is quite another thing. A Standard policy calls for the assumption of many obligations other than the payment of a judgment rendered against the insured . . .

American Family, 517 S.W.2d at 114.

This Court, applying Missouri law in *St. John's Reg. Health Ctr. v. American Cas. Co.*, 980 F.2d 1222, 1224-25 (8th Cir. 1992) (Beam, J.), recently followed the Missouri Supreme Court's decision in *American Family*, and held that a group of hospitals' self-insurance plan also was not insurance. *Id.* at 1225-27. In reaching this conclusion, this Court appropriately observed that

> Determining the plain meaning of the term "insurance" is not a straightforward task, but several courts wrestling with "other insurance" clauses have noted that "[a]s a matter of common understanding, usage, and legal definition, an insurance

> contract denotes a policy issued by an authorized and licensed insurance company whose primary business it is to assume specific risks of loss of members of the public at large in consideration of the payment of a premium." [Citations omitted.] **There are other sorts of risk-shifting agreements which are not insurance contracts, such as private indemnity agreements collateral to the main business or transaction between parties. . . .**

Id. at 1224.[3]

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3. The Missouri Supreme Court's decision in *American Family* and this Court's decision in *St. John's* are in accord with the majority of cases which have considered whether self-insurance is insurance. Annot., "Self-insurance against liability as other insurance within the meaning of liability insurance policy," 46 A.L.R. 4th 707, 710, § 2 (1986) ("self-insurance against liability has generally been held not to be 'other insurance' within the meaning of a liability insurance policy, although there is authority to the contrary . . .").

The Missouri appeals court decision cited by plaintiff for the proposition that self-insurance is insurance, *Heavens v. Laclede Gas Co.*, 809 S.W. 2d 162 (Mo. App. 1991), is not only contrary both to the decision of the Missouri Supreme Court in *American Family* and to the general rule set forth in the ALR annotation cited above, but also fails even to cite, let alone discuss, the contrary Missouri Supreme Court decision in *American Family*. *Heavens* thus should not be considered by this Court — which is obligated to apply Missouri law — as accurately representing Missouri law. *Forsthove v. Hardware Dealers Mut.*

(Cont'd)

The latter is precisely the situation here. Agency, as part of its car rental agreement — and collateral to the main car rental transaction between it and Wilhite — agreed to settle or defend, as it considered appropriate, any claim or suit seeking damages for bodily injury or property damage arising out of the operation of the rental car by Wilhite to the minimum amount required by the applicable motor vehicle financial responsibility law — **$25,000**. (T.R. 251; Pl. Ex. 16, p. 2, ¶ 1.) Agency did not issue any policy of automobile liability insurance to Wilhite, or agree to "insure" Wilhite. Agency's private indemnity agreement with Wilhite, like the self-insurance in *American Family* and *St. John's*, is not insurance.

As the court held in *Holiday Inns, Inc. v. Thirteen-Fifty Inv. Co.*, 714 S.W. 2d 597, 602 (Mo. App. 1986),

> Contracts of indemnity are not synonymous with contracts of insurance. . . . Had the legislature meant to include a contract of indemnification it would have so stated. The legislature is not so careless in its choice of words.

See also, Isaac H. Blanchard Co. v. Hamblin, 144 S.W. 880, 881-82 (Mo. App. 1912):

> A contract between a limited number of

(Cont'd)

Fire Ins. Co., 416 S.W. 2d 208, 213 (Mo. App. 1967) (a court of appeals is not bound to follow the reasoning and rule of another court of appeals if such reasoning and rule are not in accord with the decisions of the Missouri Supreme Court).

> individuals, partnerships, and corporations engaged in the same line of business by which they undertake to indemnify each other against loss by fire, and do not purpose to issue policies to others not parties to the contract, is not a contract for the creation of the insurance business, within the meaning of that term as expressed in our statutes. It is to be classified as an interindemnity contract, and therefore outside the purview of the insurance law. . . .

Thus, the indemnity clause in Agency's car rental contract is **not insurance**, and Agency is not a **"liability insurer,"** as required under *Zumwalt* and *Metcalf* to be liable for the tort of bad faith refusal to settle claims. Furthermore, Agency has found no Missouri case imposing liability on a self-insured for the tort of bad faith refusal to settle, and plaintiff has cited none. Consequently, Agency cannot be held liable for that tort under Missouri law, and the judgment below should be reversed.

Although a California case *(Nathanson v. Hertz Corp.*, 227 Cal. Rptr. 799 (Cal. App. 1986)), and a Pennsylvania case *(Gavaghan v. Replacement Rent-A-Car, Inc.*, 811 F. Supp. 1077 (E.D. Pa. 1992), hold that self-insured car rental companies can be liable for the tort of bad faith refusal to settle, those cases are readily distinguishable on their facts and on special California and Pennsylvania statutes—which Missouri does not have.

In *Nathanson*, Hertz, unlike Agency here, issued a Basic

Automobile Liability Insurance Policy to its renters pursuant to the rental agreement. 227 Cal. Rptr. at 800, n. 2, 802, 803. In addition, it was undisputed that Hertz added some consideration for this coverage to the car rental, and that Hertz set aside a "reserve" for the payment of claims. 227 Cal. Rptr. at 802. There is no such evidence in this case.

Furthermore, in California, the duty of an insurance company to exercise good faith in settling claims of third parties is imposed by statute—California Insurance Code § 790.03(h) [4] 227 Cal. Rptr. at 800, n.3. Section 790.01 of the California Insurance Code imposes that statutory duty on various types of insurance companies, "as well as all other persons engaged in the business of insurance." Cal. Ins. Code § 790.01; 227 Cal. Rptr. at 800, n.3, 802. The *Nathanson* court relied on the quoted language to impose such duty on Hertz. 227 Cal. Rptr. at 802-03.

Referring to paragraph 9 of the Hertz car rental agreement, the court observed that "Hertz agree[d] to provide liability coverage For the customer 'with standard provisions of a basic automobile liability insurance policy,' " and that this "established that Hertz is collaterally and substantially engaged in the business of insurance as it relates to its own rental customers." *Id.* at 803. The court, therefore, held that Hertz could be liable under the statute for bad faith refusal to settle.

In the present case, however, plaintiff has not established

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4. The California Supreme Court later reversed its earlier position that there was a private right of action against insurers for bad faith refusal to settle under this statute. *Moradi-Shalal v. Firemen's Fund Ins. Co.*, 758 P.2d 58 (Cal. 1988).

any comparable facts or pointed to any comparable Missouri statutes. Agency did not issue a basic automobile liability insurance policy to Wilhite; Agency merely agreed to indemnify and hold him harmless up to the minimum amount required by law. Furthermore, plaintiff did not prove that Agency charged a premium for insurance as part of its rental, or that Agency established reserves for claims. Finally, plaintiff has cited no Missouri statute like California Insurance Code Section 790.01, imposing a statutory duty of good faith upon "all other persons engaged in the **business of insurance.**" As a result, *Nathanson* likely would not be followed by the Missouri Supreme Court, particularly in view of the Missouri Supreme Court's decision in *American Family. Nathanson,* therefore, should not be applied by this Court in this case.

Likewise in *Gavaghan,* a specific Pennsylvania statute (42 Pa. Cons. Stat. § 8371) "create[d] a private cause of action for bad faith conduct by an insurer against an insured." 811 F.Supp. at 1079. "Although the Pennsylvania Supreme Court has yet to address this precise issue *(Id.* at 1081)," the *Gavaghan* court held that it would apply section 8371 to self-insureds because other decisions showed that "Pennsylvania courts refuse to distinguish between self insureds, and those with a policy of insurance when to do so denies an injured party coverage simply because of a vehicle owner's choice to self insure." *Id.* at 1082.

The Missouri Supreme Court, however, treats self-insureds as self-insureds, not as insurance companies. *American Family,* 517 S.W.2d at 112-14; *see St. John's,* 980 F.2d at 1224-27. The majority rule of other states is the same in cases deciding whether self-insurance constitutes "other insurance." 46 A.L.R. at 710 ("self-insurance against liability

has generally been held not to be 'other insurance' within the meaning of a liability insurance policy, although there is authority to the contrary . . .").[5] Accordingly, *Gavaghan is* based on Pennsylvania decisions that are contrary to the controlling decision of the Missouri Supreme Court, as well as the majority rule of other states. *Gavaghan*, therefore, likely would not be followed by the Missouri Supreme Court, and should not be followed by this Court.

Accordingly, this Court should hold that Agency is not an insurance company and, therefore, cannot be held liable for the tort of Bad faith refusal to settle under Missouri law. Because the district court incorrectly submitted plaintiff's case to the jury on the tort theory of bad faith refusal to settle, and the jury clearly found for plaintiff on that basis, since it awarded punitive damages which otherwise were not permissible in this case, this Court should reverse the judgment below and enter judgment for Agency.[6]

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5. The following cases are cited in support: *Universal Underwriters Ins. Co. v. Marriott Homes, Inc.*, 238 So.2d 730 (Ala. 1970); *Southeast Title & Ins. Co. v. Collins*, 226 So.2d 247 (Fla. App.), *cert. denied*, 232 So.2d 180 (Fla. 1969); *Home Indem. Co. v. Humble Oil & Rfg. Co.*, 314 S.W.2d 861 (Tex. Civ. App.), *aff'd*, 317 S.W.2d 515 (Tex. 1958); *American Family Mut. Ins. Co. v. Missouri Power & Light Co.*, 517 S.W.2d 110 (Mo. 1974); *United Nat. Ins. Co. v. Philadelphia Gas Works*, 289 A.2d 179 (Pa. Super. 1972); *Allstate Ins. Co. v. Zellars*, 462 S.W.2d 550 (Tex. 1970); *St. John's Regl. Health Ctr. v. American Cas. Co.*, 980 F.2d 1222 (8th Cir, 1992) (Mo. law); *Wake Cty. Hosp. Sys., Inc. v. National Cas. Co.*, 804 F. Supp. 768 (E.D.N.C. 1992), *aff'd*, 1993 U.S. App. Lexis 15159 (4th Cir. 1993); *Aetna Cas. & Sur. Co. v. James J. Benes & Assoc., Inc.*, 593 N.E.2d 1087 (Ill. App.), *app. denied*, 602 N.E.2d 445 (Ill. 1992).

* * *

6. Although plaintiff may argue that the reversal of the judgment below only on her bad faith tort theory entitles her to a new trial on her remaining breach of contract claim, plaintiff's assignor's failure to cooperate with Agency

(Cont'd)

Appendix E

* * *

[Page 19]

* * *

IV. WILHITE'S CLAIMS FOR THE TORT OF BAD FAITH AND FOR PUNITIVE DAMAGES WERE NOT ASSIGNABLE TO PLAINTIFF UNDER MISSOURI LAW, AND THEREFORE PLAINTIFF HAD NO SUCH CLAIMS.

A claim for bad faith refusal to settle is a tort claim for personal injuries. *Zumwalt*, 228 S.W.2d at 756; *Landie*, 390 S.W.2d at 565. While a claim for breach of contract is assignable under Missouri law, a tort claim "based upon wrongful or negligent acts resulting in personal injuries" is not. *Freeman v. Berberich*, 60 S.W.2d 393, 401 (Mo. 1933). Indeed, an attempt to transfer an unliquidated tort claim for personal injuries is void and unenforceable as against the public policy of Missouri. *Forsthove* v. *Hardware Dealers Mut. Fire Ins. Co.*, 416 S.W.2d 208, 212-18 (Mo. App. 1967); *Chuning v. Calvert*, 452 S.W.2d 580, 584-85 (Mo. App. 1970); *Travelers Indemnity Co. v. Chumbley*, 394 S.W.2d 418, 423 & n. 12 (Mo. App. 1965). Accordingly, the district court erred in submitting plaintiff's bad faith refusal and punitive damage claims to the jury, and this Court should reverse the judgment below and enter judgment for Agency.[10]

(Cont'd)
in connection with the underlying Quick lawsuit forecloses that claim, and thus a new trial would not be warranted. See discussion under point III below.

* * *

10. See discussion in note 6 above.

Appendix E

Plaintiff again cites *Ganaway,* this time for the proposition that a claim for bad faith against an insurance company is assignable. (Apee. Br. at 32.) Although *Ganaway* may so hold, it should not be followed by this Court. That holding in *Ganaway is* based upon an incorrect analysis of what interests of a debtor in bankruptcy become part of the bankrupt's estate under federal bankruptcy law, and on the "general law" of other states, which is contrary to the Missouri law cited above. 795 S.W.2d at 564-65.

The bankruptcy law analysis is faulty: bankruptcy courts sitting in Missouri have not allowed unliquidated personal injury tort claims to become a part of the bankruptcy estate. *In re Mitchell,* 73 B.R. 93, 95 (Bankr.E.D.Mo. 1987) (personal injury claims); *In re Scarlett,* 121 B.R. 578, 579-81 (W.D. Mo. 1990) (legal malpractice claim); *In re Shahzad,* 147 B.R. 34, 36-37 (Bankr.E.D.Mo. 1992) (claims for mental anguish, humiliation, embarrassment, and damage to credit reputation as a result of wrongful payment of check on forged endorsement); *In re Winters,* 424 F.Supp 1389, 1390 (E.D. Mo. 1975) *("Ex Delicto* unliquidated claims for personal injuries . . . do not vest in a trustee in bankruptcy"). Missouri courts have similarly held that debts for which an attachment may issue must possess an actual character and not be merely possible, dependent on a contingency that may never happen. *State Government Employees Ins. Co. v. Lasky,* 454 S.W.2d 942, 950 (Mo.App. 1970) ("It would be difficult to imagine a so-called indebtedness more contingent and speculative than an action for personal injuries resulting from the alleged negligence of a defendant").

Moreover, the "general law" of other states cited by the *Ganaway* court is contrary to the Missouri law set forth in the

cases cited above. As a result, *Ganaway* should not be followed. *Forsthove,* 416 S.W.2d at 213 (court of appeals is not bound to follow rule announced by another court of appeals when that rule is not in accord with the decisions of the Missouri Supreme Court).

Plaintiff also cites *State ex rel. Park Nat. Bank v. Globe Indemnity Co.,* 61 S.W.2d 733 (1933), asserting that it "actually sets forth a rule indicating in all instances a claim for bad faith asserted against a liability insurer is assignable." (Apee. Br. at 32.) *Globe Indemnity* does nothing of the sort. *Globe Indemnity* does not even deal with the tort of bad faith refusal to settle; it deals instead with a claim on a notary's bond for negligent acknowledgement of a deed of trust. 61 S.W.2d at 734.

Indeed, the language of *Globe Indemnity* cited by plaintiff (Apee. Br. at 32-33) actually supports the contrary proposition: that the purely personal tort of bad faith is not assignable. Thus, the Missouri Supreme Court held, at the end of the passage quoted by plaintiff:

> "Practically the only classes of choses in action which are not assignable are those for torts for personal injuries, and for wrongs done to the person, the reputation, or the feelings of the injured party, . . ."

61 S.W.2d at 736, quoting from 2 R.C.L. 596, § 3.

Plaintiff then cites *State ex rel. Smith v. Greene,* 494 S.W.2d 55 (Mo. 1973), for the proposition that a claim for punitive damages also is assignable. (Apee. Br. at 33.)

Appendix E

Plaintiff's reliance on *Greene* is seriously mistaken. *Greene* did not hold that a claim for punitive damages is always assignable, as plaintiff asserts. *Greene* held, instead, that where a cause of action for which punitive damages might be recovered survives the death of the plaintiff, the claim for punitive damages survives as well. *Id.* at 60. Furthermore, in that case, the cause of action was a statutory cause of action for double damages for destruction of personal property (Mo. Rev. Stat. § 537.330), not a cause of action for personal injury, and another statute (Mo. Rev. Stat. § 537.010) expressly provided that the action could be brought by the executor or administrator of the injured party after his death. 494 S.W.2d at 57-58. Thus, *Greene* is wholly inapplicable here. And, even if it were applicable, it would not support the assignment of Wilhite's claim for punitive damages, because the underlying claim for bad faith refusal to settle is not *assignable,* in any event, for the reasons stated above.

Plaintiff further relies on *Eastern Atlantic Transp. & Mech. Eng., Inc. v. Dingham,* 727 S.W.2d 418 (Mo. App. 1987), to support her argument that Wilhite's punitive damage claim is assignable. (Apee. Br. at 33.) Another court has analyzed the reasoning in *Eastern Atlantic,* and found it to be contrary to Missouri common law and statutes:

> The Trustee has cited *Eastern Atlantic Transportation and Mechanical Engineering, Inc. v. Dingham,* 727 S.W.2d 418 (Mo. App. W.D. 1987), which held that a claim for punitive damages against an escrow agent for breach of fiduciary duty is assignable. The escrow agent breached his fiduciary duty by failing to collect and

> distribute funds as he was obligated to do by the terms of the escrow agreement. The court stated that "[t]he test used to determine whether a cause of action is assignable is whether or not it would survive to the personal representative." *Id.* at 423. The *Eastern Atlantic* court's assignability survivability test (which is quite the old common law test) would lead to the conclusion that even claims for personal injuries are assignable because such claims survive, by statute, the death of the tort victim. R.S.Mo. 537.020. As previously discussed, however, in *Globe Indemnity* the Missouri Supreme Court prohibited the assignment of such claims which are not repudiated by the enactment of § 537.020. **While the result reached in *Eastern Atlantic* may be sound, that court's analysis does not square with well established Supreme Court precedent.**

Scarlett v. Barnes, 121 B.R. 578, 581 (W.D. Mo. 1990) (emphasis added). Because *Eastern Atlantic is* not in accord with "well-established Supreme Court precedent," it need not be followed by a Missouri Court of Appeals and, therefore, should not be followed by this Court. *Forsthove,* 416 S.W.2d at 208.

Consequently, while Wilhite's claim for breach of contract was assignable, his bad faith tort claim and punitive damage claim were not. Therefore, the verdict has been tainted by the improper admission of evidence and the submission of

erroneous legal theories to the jury. As a result, this Court should reverse the judgment below and, for the reasons stated above (see note 6 above), should enter judgment for Agency.

* * *

(3)

Supreme Court, U.S.
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No. 95-1016

In The

Supreme Court of the United States

October Term, 1995

KATHLEEN QUICK,

Petitioner,

v.

NATIONAL AUTO CREDIT, INC.
f/k/a AGENCY RENT-A-CAR, INC.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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11 Samuel Williston, Williston on Contracts, § 1338 (Walter H. E. Jaeger & Ruth Jaeger Fielding, eds., 3d ed. 1968) 1

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REPLY BRIEF

Respondent, Agency Rent-A-Car, Inc., now known as National Auto Credit, Inc. has made several misstatements within its brief in opposition.

First, the Eighth Circuit Court of Appeals did not determine that the judgment below included tort damages. In fact, a judgment was rendered for actual damages. The Eighth Circuit logically inferred that the jury also found that a claim for bad faith had been established because it awarded punitive damages, in addition to the actual damages. (See opinion at p. 5 Petitioner's App.)

The measure of the actual damages sustained by Wilhite, claims for which were assigned to Quick, were essentially the same whether they sounded in contract or in tort. Contrary to Respondent's representation, there in fact is no distinction between actual damages attributable to the tort claim and the breach of contract claim.

The general rule for measuring damages for breach of contract is to put the non-breaching party in as good a position as he would have been had the contract been kept or performed. See 11 Samuel Williston, Williston on Contracts, § 1338 (Walter H. E. Jaeger & Ruth Jaeger Fielding, eds., 3d ed. 1968); 5 Arthur Linton Corbin, Corbin on Contracts, § 992 (1964); John Calamari, et al., The Law of Contracts, § 14-4 (3d ed., Horn Book Series 1987). The assigned tort claim of bad faith sought recovery of actual damages which were the same actual damages applicable to the breach of contract claim, and properly measured in the same manner. 4 Restatement (Second), Of Torts § 903 cmt. a (1979).

This Court specifically has held that where the loss is merely pecuniary, the measure of damages for a breach of a duty implied as a matter of law, (i.e., a tort), or for a breach of a contract duty remains essentially the same. In *Carey v. Piphus*, 435 U.S. 247, 55 L.Ed.2d 252, 98 S. Ct. 1042 (1978), the Supreme Court stated: "Our legal system's concept of damages reflects this view of legal rights. 'The cardinal principle of damages in Anglo-American law is that of compensation for the injury caused to plaintiff by defendant's breach of duty.' 2 F. Harper and F. James, Law of Torts, § 25.1, p. 1299 (1956)." The Supreme Court reiterated the general rule applicable to award of damages for breach of a duty implied by tort law in *East River Steam Ship Corporation v. Transamerica Delaval, Inc.*, 476 U.S. 858, 90 L.Ed.2d 865, 106 S. Ct. 2295 (1986), holding that damages for a claim sounding in tort generally should compensate a plaintiff for loss and return the plaintiff to a position he would have occupied before the injury.

There never has been any question or contention that Wilhite's damages were anything other than the judgment of $6.5 million plus interest resulting from the breach of obligations owed to him by Agency. The effort on the part of Agency to distinguish "tort based damages" from contract based damages is an effort to make a distinction without a difference. Pecuniary losses asserted, whether in the prosecution of a tort claim or breach of contract claim, entitle a party to recover its damages in such sum as is necessary to make the non-breaching party whole.

The assertion at page 3 in Respondent's brief in opposition that " . . . Agency moved for judgment as a

matter of law at the close of the Petitioner's evidence, and at the close of all evidence, on the same grounds on which the Eighth Circuit reversed (except assignability)" is absolutely incorrect. The Eighth Circuit, in reversing judgment of the trial court, factually determined Agency had no control over the settlement process and therefore owed no fiduciary duty. The motions referenced by Agency in its brief in opposition never disclaimed that it had the right and obligation to control defense, control settlement, or that a fiduciary duty was owed to Wilhite. The appendix to Agency's brief in opposition, at p. 21a (Excerpts of Brief of Appellant National Auto Credit, Inc. – submitted to the Eighth Circuit) reflect, in part, Agency's admission of these facts. The testimonial admissions at trial of Agency's vice president and head of its claims department, its claims adjuster assigned to the case, and its own in-house counsel that Agency controlled defense of Wilhite, controlled settlement of the claims against Wilhite and in fact owed Wilhite a fiduciary duty are set forth verbatim within the petition and suggestion for rehearing filed with the Eighth Circuit Court of Appeals after issuance of its opinion (see Appendix to Petition for Writ of Certiorari at pp. 61-77).

Agency asserts that the Eighth Circuit made legal determinations, not fact determinations contrary to those of the jury. (Brief in Opposition, p. 4) In fact, the judgment of the Eighth Circuit determining that the District Court should have granted Agency's motion or motions for judgment as a matter of law was premised upon the Eighth Circuit's oversight or refusal to accept the facts placed into evidence before the jury and which the jury implicitly determined in Quick's favor by its verdict.

Reaching a legal conclusion after refusing to consider and accept the facts and testimonial admissions which the jury heard at trial, or ignoring those facts, is an invasion of the province of the jury in violation of the seventh amendment.

The Court may dispense with the assertions that Quick may have belatedly raised a constitutional issue by noting that there was no constitutional issue in the case until the opinion was handed down by the Eighth Circuit. Subsequent to the opinion, the constitutional issues were raised as indicated within the petition for rehearing (Petitioner's Appendix to Petition for Writ of Certiorari at pp. 61-77).

Agency has suggested to this Court that Quick failed to raise the fourteenth amendment due process issue in the Eighth Circuit and should be precluded from doing so now. Neither at trial nor during appeal was there any indication that Kathleen Quick would suffer a constitutional deprivation.

The Eighth Circuit has created the fourteenth amendment violation by determining that under Missouri's automobile insurance and self-insurance laws, those who obtain automobile liability protection from a self-insured automobile rental company are denied the same damages available to those who obtain automobile insurance from a company that is primarily engaged in the business of automobile insurance. To the extent that the Eighth Circuit may be deemed correct in its determination of Missouri law that breach of a car rental contract where a fiduciary duty was owed allows for a different measure

of damages than breach of any other type of insurance related contract where a fiduciary duty is owed, then Wilhite did suffer disparate treatment in the application of state law. Allowing for such disparate treatment is a violation of his fourteenth amendment rights.

Agency rightfully has suggested that the fifth amendment is appropriate in this case; however, for the wrong reason. Agency admitted during trial that it owed a fiduciary duty and a duty of trust, just like an insurance company; a duty to settle claims within limits; and a duty to defend. These facts were not disputed at the trial level nor raised as an issue on appeal. The Eighth Circuit's determination that Agency did not owe a fiduciary duty when this fact was admitted by Agency violates Quick's fifth amendment right of due process and this Court's long standing rule against deciding issues not raised at the lower court or on appeal.

In the case of *Singleton v. Wulff*, 428 U.S. 150, 49 L.Ed.2d 826, 96 S. Ct. 2868 (1976), this Court instructed the Eighth Circuit that:

> It is the general rule, of course, that a federal appellate court does not consider an issue not passed upon below. In *Hormel v. Helvering*, 312 U.S. 552, the Court explained that this is "essential in order that parties may have the opportunity to offer all the evidence they believe relevant to the issues . . . [and] in order that litigants may not be surprised on appeal by final decision there of issues upon which they have had no opportunity to introduce evidence," at 2877.

Petitioner Quick could no more anticipate that the Eighth Circuit would violate the Seventh Amendment to the United States Constitution than it could reasonably anticipate that the Eighth Circuit would refuse to follow the well-documented standard of review in addressing a motion for judgment as a matter of law. *Nelson v. Boatmen's Bancshares, Inc.*, 26 F.3d 796 (8th Cir. 1994). The only way that Quick could have brought the constitutional questions before the Eighth Circuit any earlier would have required an assumption that the Eighth Circuit would completely refuse to recognize and follow any fundamental legal principles.

Contrary to the contention of Agency, the amount of damages awarded on the breach of contract claim was not limited under Missouri law to the contractual limit of liability protection which Agency had promised to provide for Wilhite's benefit. Wilhite never asserted a claim to recover the benefit of his contract with Agency after the default judgment was obtained against him. He lost that promised benefit when Agency refused to defend him in the wrongful death suit instituted against him by Quick, refused to settle the wrongful death suit, and allowed a judgment to be obtained against him for $6.5 million. The uncontroverted evidence presented at trial established that the wrongful death suit against Wilhite could have been settled by payment of the $25,000.00 liability protection limit which Agency promised. The uncontroverted evidence at trial established that Agency was forewarned that the wrongful death suit against Wilhite might have a value equal to or exceeding $6.5 million. The uncontroverted evidence at trial established that a $6.5 million judgment rendered against Wilhite

would not have occurred had Agency provided any defense of Wilhite in the suit. After the failure to perform by Agency and consequent judgment against Wilhite for $6.5 million, the promised benefits of legal defense and the $25,000.00 liability protection limit would have been of little consequence to Wilhite. The decision of the Eighth Circuit, reducing actual damages from $6.5 million with interest, to $25,000.00 is akin to an effort to put the toothpaste back in the tube.

After the default judgment was rendered against Wilhite, it was too late for him to ask for the benefit of his bargain. It was the actual detriment or loss sustained by Wilhite which Wilhite was entitled to recover as damages attributable to the breach. The uncontroverted evidence at trial established that Agency's performance of its contractual obligations would have avoided the judgment against Wilhite for $6.5 million entirely. The loss (adverse judgment) occasioned by lack of performance is in fact the only evidence of damage Wilhite sustained. Agency's representatives admitted the foreseeability of their failure to perform resulting in the substantial judgment against Wilhite (see Petitioner's Appendix at p. 67, testimony of in-house counsel, Yormick).

The cases in Missouri dealing with bad faith consistently hold that an insuror is obligated to pay all resultant damages when it fails or refuses to settle within policy or liability protection limits available.

CONCLUSION

There were no tort-based damages assessed by the jury. The jury assessed the actual damages sustained by Wilhite as the result of wrongs of Agency. All of the elements necessary to prove the breach of contract, the actual damages, the fiduciary relationship and "control" over the settlement process were part of the evidence presented before the jury by virtue of the testimonial admissions of Agency's own representatives. The opinion of the Eighth Circuit did not involve a legal determination. It was merely disguised as one.

Respectfully submitted,

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In The

Supreme Court of the United States

October Term, 1995

KATHLEEN QUICK,

Petitioner,

v.

NATIONAL AUTO CREDIT, INC.
f/k/a AGENCY RENT-A-CAR, INC.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

MOTION OF KENDRICK WILHITE FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONER KATHLEEN QUICK

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MOTIONS FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE

Kendrick Wilhite moves the Court to enter its order granting him leave to file an amicus brief in support of the petition for certiorari of Kathleen Quick filed with the United States Supreme Court on or about December 26, 1995.

Consent for leave to file an amicus brief has been sought from all parties. Petitioner Kathleen Quick has, by and through her counsel, consented. Respondent, National Auto Credit, Inc. f/k/a Agency Rent-A-Car, Inc. has refused to grant consent.

The nature of the interest of movant, Kendrick Wilhite, is such that the Eighth Circuit Court of Appeals has held that his assignment to Kathleen Quick of his claim for bad faith against Agency Rent-C-Car, Inc., arising out of a contractual relationship, is invalid. In addition, the Eighth Circuit purported to rule on the merits of the claim of bad faith which Wilhite endeavored to assign to Kathleen Quick while at the same time, and in the same opinion, concluding that the claim had not been properly assigned to Kathleen Quick and was therefore not before the Court for its consideration.

Kendrick Wilhite was not a party to the suit instituted in the United States District Court for the Western District of Missouri giving rise to the appeal and opinion issued by the Eighth Circuit Court of Appeals which petitioner Kathleen Quick now seeks to have reviewed by the Supreme Court on her petition for certiorari. The Eighth Circuit should not have reversed the judgment and verdict of the jury, or alternatively, should not have

addressed the merits of the claim for bad faith. Either the claim was properly assigned and properly asserted by an assignee with standing, or was not before the court at all.

It is believed that the petition for certiorari of Kathleen Quick does not adequately address the dilemma created by the opinion of the Eighth Circuit Court of Appeals in view of its determination that the claim of bad faith was not properly assigned, coupled with its ruling on the merits of the claim which, if not properly assigned, could not have been properly before the Court for consideration.

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QUESTIONS PRESENTED

1. Should the Eighth Circuit be allowed to rule that a claim prosecuted through trial was not properly assigned to the Petitioner, judgment creditor of the assignor, and in addition, rule on the merits of the claim which the judgment debtor (assignor) had undertaken to assign to the Petitioner, thereby rendering judgment on a claim or property interest not properly before the court, while the assignor was not a party to the suit and not before the court?

2. Should the Eighth Circuit be allowed to hold that a claim or cause for action, constituting a property interest, may not be assigned by a judgment debtor to a judgment creditor for valuable consideration?

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is reported at 65 F.3d 741 (8th Cir. 1995). Judgment entered by the United States District Court for the Western District of Missouri on the jury verdict is unreported. A related opinion was issued by the Missouri Court of Appeals: *Quick v. Wilhite*, 895 S.W.2d 90 (Mo.App. 1995).

JURISDICTION

A jury verdict was rendered on the 28th day of September, 1994 and judgment of the United States District Court for the Western District of Missouri was entered thereon on the same date. The opinion of the United States Court of Appeals for the Eighth Circuit reversing the judgment was issued on the 12th day of September, 1995. Kathleen Quick submitted a petition for rehearing en banc and before the panel to the United States Court of Appeals for the Eighth Circuit on the 26th day of September, 1995. The petition for rehearing en banc and for rehearing by the panel was denied by the United States Court of Appeals for the Eighth Circuit on November 2, 1995. Jurisdiction of the United States Supreme Court has been sought by the petitioner, Kathleen Quick, pursuant to Title 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS AND STATUTES

AMENDMENT V TO THE UNITED STATES CONSTITUTION

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

BRIEF OF AMICUS CURIAE SUBMITTED BY KENDRICK WILHITE

Summary of Argument

Kendrick Wilhite sought to protect his economic interests by assigning his contract based claims against Agency Rent-A-Car, Inc. to Kathleen Quick. The claims or causes of action arose out of a failure on the part of the car rental company to defend him in a wrongful death suit, as well as its failure to settle the suit within the limit of liability protection which was afforded to him under the terms of his car rental contract.

The assigned claims of breach of contract and bad faith were successfully prosecuted to jury verdict by Wilhite's assignee, Kathleen Quick.

The United States Court of Appeals for the Eighth Circuit held that the claim for breach of contract was validly assigned and that the tort claim of bad faith arising out of the contractual relationship was not validly assigned. In the context of its opinion however, the Eighth Circuit addressed the merits of what it held was not a validly assigned bad faith claim. The opinion of the United States Court of Appeals for the Eighth Circuit in ruling on a claim which it determined was not properly assigned and therefore not asserted by a party with standing before the Court, constitutes a violation of Wilhite's Fifth Amendment rights to due process. The opinion purports to weigh and address the merits of a claim which the Eighth Circuit implicitly determined by its holding was neither before the trial court or before the Eighth Circuit by virtue of an invalid assignment of a tort claim.

Argument

A claim or cause of action is a species of property which this Court has held is protected by the constitutional considerations pertaining to due process rights. *Tulsa Collection Servs. v. Pope*, 485 U.S. 478, 99 L. Ed. 2d 565, 108 S. Ct. 1340 (1988). Wilhite was not a party to the suit instituted by Kathleen Quick against Agency Rent-A-Car, Inc. wherein claims were asserted for breach of contract and bad faith. Those claims were assigned by Wilhite to Kathleen Quick so that he might protect his own economic interests and avoid possible garnishment or collection activity being undertaken against him, premised upon the default judgment obtained by Kathleen Quick against him. It should be remembered

that default judgment was obtained because of the failure of contract performance on the part of Agency Rent-A-Car, Inc.

Wilhite did not at any time endeavor or purport to assign any claim or cause of action for personal bodily injuries. The claims which he assigned were those arising out of or relating to the failure of Agency Rent-A-Car, Inc. to perform its contractual obligations to defend and settle claims against him which arose by virtue of an automobile accident in which he was involved while operating a rented automobile.

Subsequent to the assignment and during the course of discovery and trial of the suit, Wilhite was merely a witness. He was never a party.

The determination by the Eighth Circuit Court of Appeals that Wilhite possessed no bad faith claim is clearly contrary to existing law. Moreover, that determination is in clear violation of admonition that federal appellate courts should not endeavor to resolve disputes not properly before it. *Singleton v. Wulff*, 428 U.S. 106, 49 L. Ed. 2d 826, 96 S. Ct. 2868 (1976).

Simply put, assuming arguendo that the Eighth Circuit Court of Appeals' determination that a bad faith claim was not properly assigned by Wilhite to Quick, then the claim was not before the trial court or before the Eighth Circuit as Quick had no standing to assert the claim of bad faith. The Eighth Circuit Court of Appeals' speaking to the merits of a claim not properly before it constitutes an unlawful deprivation of a protected and tangible property interest.

The United States Supreme Court has held that lack of standing to assert a claim or cause is jurisdictionally fatal and bars adjudication of a claim before the Court. Holding otherwise would be in violation of the Article III requirement of justiciability. *Allen v. Wright*, 468 U.S. 737, 82 L. Ed. 2d 556, 104 S. Ct. 3315 (1984). The Missouri Supreme Court has held that standing is akin to jurisdiction over the subject matter, in limine, and as such, the question of a party's standing can be raised at any time, even sua sponte by the Court. *State ex rel. Mathewson v. Election Commissioners*, 841 S.W.2d 633 (Mo. 1992). The instruction of these case authorities is such that the Eighth Circuit Court of Appeals was in error in determining that the claim of bad faith was not properly assigned to Quick, or was in error in addressing the merits of a claim as not properly brought before a court by a party with standing to assert the claim.

There is in fact no policy reason for prohibiting a disposition, transfer or assignment of a claim or cause of action, whether sounding in contract or in tort, arising out of a breach of a contractual relationship. The Eighth Circuit Court of Appeals was plainly wrong in its determination that the claim for bad faith had not been properly assigned. The Eighth Circuit's authoritative justification indicated for this conclusion in the opinion reveals that the Eighth Circuit was relying upon case authorities expounding upon the social policy prohibition against assigning claims for personal bodily injury.

As this Court has pointed out in *Singleton v. Wulff*, 428 U.S. 106, a federal court should hesitate before resolving a controversy on the basis of rights of third persons which are not parties to the litigation. Wilhite was not a

party to the underlying litigation. He was a witness. The opinion of the Eighth Circuit purportedly accomplishes that which Wilhite himself could not have done, that is, splitting his cause of action against Agency Rent-A-Car, Inc.

Wilhite now occupies the unenviable position of endeavoring to assert, in his own name, and on his own behalf, what the Eighth Circuit Court of Appeals has determined to be an unassigned claim for bad faith against Agency Rent-A-Car, Inc. in the face of an opinion by the Eighth Circuit Court of Appeals which adversely addressed the merits of that claim which was fully litigated by Kathleen Quick.

Assuming the Eighth Circuit Court of Appeals was correct in its determination that the claim for bad faith was unassignable, its opinion addressing that claim should have ended after that determination.

Either Kathleen Quick had standing to assert the bad faith claim by virtue of the assignment, or she did not. The Eighth Circuit Court of Appeals should not be allowed to address the merits of a property interest or its value without the owner of that property interest being a party to the litigation. In doing so, the Eighth Circuit Court of Appeals has engaged in conduct which may well deprive Wilhite of a valuable property interest without due process of law in violation of the Fifth Amendment.

CONCLUSION

It is respectfully submitted that the decision of Eighth Circuit Court of Appeals was incorrect in numerous respects, most of which are more fully addressed in the petition for certiorari submitted by Kathleen Quick. The United States Supreme Court should grant certiorari and correct the injustices occasioned by the violation of constitutional rights visited upon Kathleen Quick and Kendrick Wilhite by the conduct of the Eighth Circuit Court of Appeals and reverse the judgment of the Eighth Circuit Court of Appeals entirely, reinstating the judgment entered on the jury verdict.

Alternatively, this Court should grant certiorari to clarify the fact that any position or discussion within the Eighth Circuit opinion regarding the merits of the claim of bad faith which Wilhite endeavored to assign to Quick is mere dicta and improper in that it was not necessary to a determination of a claim which the Eighth Circuit Court of Appeals held was not validly before it.

Respectfully submitted,

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No. 95-1016

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1995

KATHLEEN QUICK,

Petitioner,

vs.

NATIONAL AUTO CREDIT, INC. f/k/a AGENCY RENT-A-CAR, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

RESPONSE OF RESPONDENT NATIONAL AUTO CREDIT, INC. IN OPPOSITION TO MOTION OF *AMICUS CURIAE* FOR LEAVE TO FILE OUT-OF-TIME BRIEF

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Respondent, National Auto Credit, Inc., formerly known as Agency Rent-A-Car, Inc., hereby opposes the Motion of Kendrick Wilhite for Leave to File *Amicus Curiae* Brief in support of the Petition for Certiorari. The Court should deny the motion for the following reasons.

ARGUMENT

I.

THE MOTION AND THE *AMICUS CURIAE* BRIEF ARE UNTIMELY.

Rule 37.2 required movant's motion and *amicus curiae* brief to be filed "within the time allowed for filing a brief in opposition to the petition for a writ of certiorari." Respondent's brief in opposition was due (and was filed) on January 25, 1996. Movant did not file his motion and *amicus curiae* brief until February 2, 1996. The motion and brief therefore are untimely, and the motion for leave to file the *amicus curiae* brief should be denied.

II.

THE MOTION AND *AMICUS CURIAE* BRIEF ARE A SUBTERFUGE FOR INTERVENTION, WHICH WAS CORRECTLY DENIED BY THE EIGHTH CIRCUIT.

The movant attempted to intervene in this case — *after judgment* — in the court below. (Motion to Intervene, filed September 26, 1995.) The Eighth Circuit correctly denied the motion to intervene. (Order, filed October 13, 1995.) *Cf. Paisley v. C.I.A.*, 724 F.2d 201, 203 (D.C. Cir. 1984). The movant has not sought review of the Eighth Circuit's denial of his motion to intervene in this Court. Instead, he seeks to file an *amicus brief* as a subterfuge for intervention. Consequently, his motion should be denied.

III.

THE *RES JUDICATA* OR *STARE DECISIS* EFFECTS ON MOVANT OF THE EIGHTH CIRCUIT'S DECISION ARE NOT BEFORE THE COURT IN THE PRESENT CASE.

The first question presented by the movant's *amicus curiae* brief is the *res judicata* or *stare decisis* effects on movant of the Eighth Circuit's decision. The movant asserts that he would be denied due process if the Eighth Circuit's decision is accorded *res judicata* or *stare decisis* effects in the event he brings a claim which the Eighth Circuit held in this case does not exist under Missouri law because he was not a party in this action.

Since the movant has brought no such claim, and has had no such claim barred by the *res judicata* or *stare decisis* effects of the Eighth Circuit's decision, there is no case or controversy, and this issue is simply speculative and not ripe for adjudication; it is more in the nature of a request for an advisory opinion. *See G. & C. Merriam Co. v. Saalfield*, 241 U.S. 22, 29 (1916); *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326, n.5 (1979). Furthermore, as discussed under point 5 below, movant was in privity with the plaintiff below and was represented by her.

IV.

THE ISSUE OF THE ASSIGNABILITY OF A TORT CLAIM UNDER MISSOURI LAW IS ALREADY BEFORE THE COURT IN THE PETITION FOR CERTIORARI.

The second question presented by the movant's *amicus curiae* brief — the assignability of a tort claim under Missouri law — is already before the Court in the Petition for Certiorari. (Pet. at i, no. 4). As a result, the *amicus curiae* brief is merely repetitive, and the motion for leave to file it should be denied.

V.

MOVANT'S PROPOSED *AMICUS CURIAE* BRIEF DOES NOT PRESENT A SERIOUS QUESTION.

Movant's entire argument is based on the premise that he was not a party to this case. As movant admits, however, he assigned his claims to the petitioner herein — the plaintiff in the district court. (Proposed *Amicus Curiae* Br. at 2.) Consequently, he was in privity with the plaintiff in this case, was represented by her, and is bound by the judgment below. *See Chicago, R.I.P. Ry. Co. v. Schendel*, 270 U.S. 611 (1926); *Chicago Life Ins. Co. v. Cherry*, 244 U.S. 25 (1917); *United States v. New York Terminal Warehouse Co.*, 233 F.2d 238, 240-41 (5th Cir. 1956); *LeDuc v. Normal Park Presbyterian Church*, 142 F.2d 105, 107 (7th Cir.), *cert. denied*, 323 U.S. 729 (1944). The application of *res judicata* in these circumstances does not raise a constitutional issue. *See Parklane Hosiery Co.*, 439 U.S. at 326-33. Accordingly, movant's proposed *amicus curiae* brief does not present a serious question to be decided by the Court.

CONCLUSION

For the foregoing reasons, the motion of *amicus curiae* for leave to file his brief should be denied.

Respectfully submitted,

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